92-41

No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ARBY'S, INC. and FRED BARTLIFF,
Petitioners,

v.

KITCHENS FOODS, INC., *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the imposition of punitive damages violates the Due Process Clause when liability is dependent on the retroactive application of a new legal standard to prior conduct.

2. Whether the lack of any post-verdict review of the reasonableness of a punitive damage award violates the Due Process Clause.

PARTIES TO THE PROCEEDING

Petitioners in this Court are Arby's, Inc.[1] and Fred Bartliff.

Respondents in this Court are Kitchens Foods, Inc.,[2] Doyle D. Kitchens, Pauline M. Kitchens, Blakely M. Kitchens and Morgan D. Kitchens.

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[1] Arby's, Inc. is a wholly-owned subsidiary of Royal Crown Corporation, which is a wholly-owned subsidiary of Chesapeake Insurance Company, which is controlled by DWG, Inc., a publicly traded company.

[2] Kitchens Foods, Inc. has no parent or subsidiary companies.

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ARBY'S, INC. and FRED BARTLIFF,
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PETITION FOR A WRIT OF CERTIORARI

Arby's, Inc. and Fred Bartliff respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this action.

ORDERS BELOW

The Order and Judgment of the United States District Court for the Southern District of Alabama (App. at 2a-9a) are unreported. The Order of the United States District Court for the Southern District of Alabama denying Petitioners' Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial and Judgment (App. at 13a-16a) are unreported. The Court of Appeals for the Eleventh Circuit affirmed the Order and Judgment of the District Court (App. at 1a) without opinion, and denied Petitioners' Suggestion for

Rehearing *En Banc* and Petition for Rehearing (App. at 10a-11a) without opinion.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on September 19, 1991 (App. at 1a). On June 5, 1992, the Court of Appeals denied Petitioners' timely Suggestion for Rehearing *En Banc* and Petition for Rehearing (App. at 10a-11a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fifth Amendment Due Process Clause provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law."

2. The Fourteenth Amendment Due Process Clause provides in relevant part: "No state shall . . . deprive any person of life, liberty, or property, without due process of law."

3. Article I, section 9, clause 3 of the Constitution provides: "No . . . ex post facto Law shall be passed."

4. Article I, section 10, clause 1 of the Constitution provides: "No State shall . . . pass any . . . ex post facto Law."

STATEMENT OF THE CASE

A. Statement Of Facts

In late 1984 or early 1985, Respondents became interested in opening a fast food restaurant in Gulf Shores, Alabama. Because there already was a fast food hamburger restaurant in Gulf Shores, Respondents decided that they wanted to open a roast beef restaurant. Accordingly, Respondents contacted the headquarters of Arby's, Inc., a national franchisor. Upon learning of Respondents' interest, Arby's instituted its standard proce-

dures for dealing with prospective licensees, including sending Arby's Uniform Franchise Offering Circular. That Circular contained information pertinent to Respondents' investment decision.

On May 20, 1985, an Arby's Regional Franchise Manager, Fred Bartliff, traveled to Gulf Shores to meet with Respondents. Three of the individual Respondents testified that during this visit Bartliff made projections as to the annual sales volume ($1,000,000) and profits (10-18%) that could be expected if Respondents built and opened a restaurant at a particular site in Gulf Shores. These Respondents also testified that Bartliff repeated these projections on May 30, 1985 in a conversation in Atlanta.

Respondents opened their restaurant in Gulf Shores on November 11, 1985. They operated the restaurant for a period of several years and then abandoned the restaurant on May 4, 1989.

Respondents filed this civil action in the Circuit Court of Mobile County on July 29, 1988. In their Complaint, Respondents alleged fraud, fraudulent suppression, and conspiracy on the part of Petitioners Arby's and Bartliff, and certain other persons and entities not parties to this Petition. The case was removed to the United States District Court for the Southern District of Alabama, Southern Division, based on federal diversity jurisdiction under 28 U.S.C. § 1332.

Near the end of the discovery period, the Court granted summary judgment in favor of Arby's and Bartliff on Respondents' conspiracy claim. The Court also granted summary judgment as to certain aspects of the claims for fraud and suppression. The case proceeded to trial on June 19, 1990 on the basis of the remaining claims in the Complaint and a September 1, 1989 Joint Pretrial Statement setting forth the contentions of the parties. The jury returned a verdict on special interrogatories in

favor of Respondents, assessing $383,000 in compensatory damages and $1,500,000 in punitive damages (App. at 2a-9a). Arby's and Bartliff's Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial was denied (App. at 13a-15a) and judgment was entered on October 30, 1990 (App. at 16a).

Petitioners filed an appeal with the United States Court of Appeals for the Eleventh Circuit. The principal issues on appeal were whether (1) the action was timely filed, (2) the representations alleged were actionable under Alabama law, (3) the admission of certain deposition testimony was proper, and (4) the award of punitive damages was consistent with due process. Argument was heard on September 11, 1991 by Circuit Judge Anderson, Senior Circuit Judge Clark, and Senior District Judge Brown. In an unpublished, *per curiam* decision dated September 19, 1991, the panel affirmed the judgment of the District Court without opinion (App. at 1a).

Petitioners filed a Suggestion for Rehearing *En Banc* and Petition for Rehearing seeking rehearing of whether the imposition of punishment (through an award of punitive damages) is permissible under the Due Process Clause where the conduct punished was not actionable at the time it occurred. Although the Court of Appeals ordered additional briefing on the issue (App. at 12a), it denied Petitioners' Suggestion for Rehearing *En Banc* and Petition for Rehearing (App. at 10a-11a) without opinion.

B. Presentation Of The Due Process Issue

At all stages of the proceedings below, Petitioners asserted that the imposition of punitive damages violated due process. Petitioners consistently maintained a due process objection to any award of punitive damages before both the District Court and the Court of Appeals. In addition, after the change in Alabama fraud law

became apparent, *see infra* at 7-8, Petitioners argued at their earliest opportunity—before the Court of Appeals—that the award of punitive damages based on the retroactive application of new legal standards was inconsistent with due process. Thus, both of the questions presented in this Petition are properly before the Court. *See Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 111 S. Ct. 905 (1991); *Universities Research Ass'n, Inc. v. Coutu*, 450 U.S. 754 (1981).[1]

REASONS FOR GRANTING THE PETITION

I. RETROACTIVE IMPOSITION OF PUNITIVE DAMAGES

A. This Case Squarely Raises The Constitutionality Of Retroactive Imposition Of Punitive Damages

Respondents tried their fraud claim in the District Court solely on the basis of Bartliff's alleged projections concerning future sales and profits at a hypothetical restaurant that had not yet been built.[2] Thus, the claimed representations necessarily were opinions concerning uncertain future events. This was confirmed explicitly by Respondent Doyle Kitchens' trial testimony:

> Q: . . . let's focus first on the claim about a million dollars in sales. Are you with me?
>
> A: Yes, sir.

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[1] Although the emphasis of Petitioners' due process argument changed in recognition of intervening developments in Alabama law since trial, this "mere enlargement" does not change the fact that the question of whether the award of punitive damages is consistent with due process is properly before the Court. *Illinois v. Gates*, 462 U.S. 213, 248 (1983) (White, J., concurring).

[2] Respondents' fraudulent suppression claim cannot support the verdict because Respondents' admissions at trial plainly established that any "suppression" claim was time barred (App. at 17a-19a).

Q: Assuming that was said when Mr. Bartliff was there in Gulf Shores, obviously the restaurant wasn't opened; right?

A: No.

* * *

Q: And so what level of sales there might or might not be on that vacant lot was—if it was said—was a projection about future events and what they might turn out to be; right?

A: Right.

Q: *And what was said, if it was said, was Mr. Bartliff's opinion about how things might turn out in the future; right?*

A: *That's correct.*

Q: *Now, because nobody can see into the future, you understood that was Mr. Bartliff's best assessment, his best guess about what might happen; right?*

A: *Yes, sir.*

* * *

Q: On your testimony, the only representation of profits, as I understand it, was that if there were a million dollars in sales at the restaurant, then there would be 10 to 18 percent profit; is that your claim?

A: Yes, sir.

* * *

Q: *And what it was, if it was made, was Mr. Bartliff's opinion about future events; right?*

A: *Right.*

Q: So what it . . . was Mr. Bartliff's—if it was said—and that's the assumption I'm basing all these questions—*if it was said, it was Mr. Bartliff's best assessment, his best guess, about what the future might hold at the location; right?*

A: *That's correct.*

(App. at 21a-22a) (emphasis added).

Respondent Morgan Kitchens also confirmed in his testimony that the alleged representations were, at most, opinions as to unknown future events (App. at 20a). Thus, the actionability of Respondents' fraud claim turned on whether opinions are actionable under Alabama law.

In 1985, when the representations at issue are alleged to have been made, the law in Alabama was clear that to be actionable, a misrepresentation was required to concern a material existing fact. The Alabama Supreme Court stated explicitly in 1984 that "[i]t is axiomatic that mere statements of opinion are not material facts upon which actions for legal fraud can be maintained." *Jones v. McGuffin*, 454 So. 2d 509, 512 (Ala. 1984). Several 1985 Alabama Supreme Court decisions explicitly confirmed this requirement. *See, e.g., Bank of Red Bay v. King*, 482 So. 2d 274, 281 (Ala. 1985) (representation must concern "material existing fact"); *Taylor v. Moorman Mfg. Co.*, 475 So. 2d 1187, 1189 (Ala. 1985) ("material existing fact" an element of fraud). This requirement was longstanding in Alabama law. *See Sly v. First Nat'l Bank*, 387 So. 2d 198, 200 (Ala. 1980) ("We have ruled consistently that an actionable misrepresentation must be of a present fact.").[3]

Thus, as of May 1985, when the representations are alleged to have occurred, allegedly false representations concerning future events could not support a claim for fraud under Alabama law. This longstanding rule was reconfirmed in subsequent decisions. *See, e.g., Lawson v. Cagle*, 504 So. 2d 226, 227-28 (Ala. 1987) (conditional prediction of attorney not a representation of existing material fact).

It was not until long after the events at issue in this litigation that the Alabama Supreme Court began to modify its prior holdings that fraud cannot be based on

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[3] The only recognized exception to this rule at the time was "promissory fraud," which was not alleged in this action. *See P&S Business, Inc. v. South Cent. Bell Tel. Co.*, 466 So. 2d 928, 930 (Ala. 1985) (stating elements of claim for promissory fraud).

opinion. In its 1988 decision in *Reynolds v. Mitchell*, 529 So. 2d 227, 231 (Ala. 1988), the Alabama Supreme Court first suggested that a fraud claim could be based on an opinion. However, a year later, the Court seemingly reaffirmed its traditional rule, again holding explicitly and without qualification that "[f]raud cannot be based on opinion." *Keller v. Security Fed. Sav. & Loan Ass'n*, 555 So. 2d 151, 155 (Ala. 1989). Despite this clear statement, the court in September 1990 again reversed itself; relying on *Reynolds* and without reference to *Keller*, the court upheld judgments in fraud actions explicitly based on opinions. *Rodopoulos v. Sam Piki Enter., Inc.*, 570 So. 2d 661 (Ala. 1990), *modified*, 1990 Ala. LEXIS 955 (Ala. 1990); *Fraser v. Reynolds*, 588 So. 2d 442, 445 (Ala. 1990), *subsequent appeal*, 588 So. 2d 448 (Ala. 1991). Comparison of the language in these decisions with the pre-1985 decisions cited *supra* starkly reveals the change in Alabama law since the representations at issue allegedly were made.

B. Retroactive Imposition Of Punitive Damages Violates Due Process

As this Court explained only last year, "under Alabama law, as under the law of most states, punitive damages are imposed for purposes of retribution and deterrence. They have been described as quasi-criminal." *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1044 (1991) (citation omitted). The conduct in this case that was punished by the award of punitive damages was not actionable at all in 1985, when it occurred; it is actionable today *only* because of the subsequent expansion by the Alabama Supreme Court of the scope of fraud liability. While the Alabama Supreme Court may have the authority to expand fraud liability and the availability of civil compensatory relief for state law torts, neither Alabama courts nor federal courts can, consistent with federal constitutional principles, retroactively impose quasi-criminal punishment.

As this Court has held several times:

> [A] statute which either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.

Roberts v. United States Jaycees, 468 U.S. 609, 629 (1984) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)); *see also, e.g., Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *Giaccio v. State*, 382 U.S. 399, 402-03 (1966). Here the standard under which Petitioners were found liable and required to pay $1,500,000 in punitive damages was not merely vague, it was non-existent at the time of the conduct in question.

Because the retroactive application of legal standards cannot provide adequate notice, retroactive lawmaking is constitutionally disfavored. The Constitution expressly forbids both state and federal governments from passing any "*ex post facto* law" that would criminalize conduct retroactively. *See* U.S. CONST. art. I, § 9, cl. 3; U.S. CONST. art. I, § 10, cl. 1. The protection of the *Ex Post Facto* Clauses is based on the right to notice that is inherent in due process. *Marks v. United States*, 430 U.S. 188, 191 (1977). Thus, this Court has reasoned that "[i]f a state legislature is barred by the *Ex Post Facto* Clause" from enacting retroactive criminal liability, the Due Process Clauses of the Fifth and Fourteenth Amendments prohibit the courts from "achieving precisely the same result by judicial construction." *Bouie v. City of Columbia*, 378 U.S. 347, 353-54 (1964).

Similarly, "[t]he constitutional prohibition against vagueness does not disappear simply because the state law at issue originated in the courts rather than the legislature." *Haslip*, 111 S. Ct., at 1058 (O'Connor, J., dissenting). Moreover, the degree of scrutiny required by the vagueness doctrine varies with the severity of the penalty imposed. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982). Although

laws and judicial acts lacking punitive character are subject to less demanding review, *see, e.g., Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1975), even non-punitive retroactive lawmaking is constitutionally disfavored. *See, e.g., United States Trust Co. v. State*, 431 U.S. 1 (1977) (retroactive lawmaking violated Contract Clause).

While punitive damages are not imposed after a criminal trial, they are, as this Court explained, "quasi-criminal." *Haslip*, 111 S. Ct., at 1044 (citation omitted). Having no fair warning that their conduct was actionable, Petitioners have been punished in the sum of $1,500,000 for venturing to estimate the future profitability of a fast food restaurant. This punishment is based on the blameworthiness of Petitioners and the purpose of achieving deterrence of similar conduct, the two objectives identified by this Court as the least likely to sustain the retroactive imposition of *civil* liability. *Turner Elkhorn*, 428 U.S., at 17-18. *A fortiori*, the retroactive imposition of quasi-criminal punishment cannot be sustained.

Due process requires at a minimum that Petitioners be given clear and prior notice of the standard of conduct they had to satisfy before they can be punished. The retroactive imposition of criminal punishment following a change in the law similar to the one that occurred here would amount to a *per se* violation of the Due Process Clause. Here, the retroactive imposition of quasi-criminal punishment is no less a violation of "the first essential of due process of law," *Roberts*, 468 U.S., at 629—adequate notice.

C. This Case Presents An Important, Recurring Issue Over Which Lower Courts Are Divided

Lower courts are divided over whether punitive damages may be imposed retroactively following imposition of a new legal standard. For example, in *Vigil v. Arzola*, 699 P.2d 613 (N.M. Ct. App. 1983), *rev'd in part on other grounds*, 687 P.2d 1038 (N.M. 1984), the New

Mexico Supreme Court recognized for the first time a cause of action in tort for retaliatory discharge but refused—as a matter of state law—to impose punitive damages on the defendant.

> Because this new cause of action imposes significant new duties, and because of reliance on the long-standing terminable-at-will rule, we hold that the new law should be given modified prospective application. Thus, we apply the law announced to the case before us, except as to punitive damages . . . .

699 P.2d, at 621-22 (citations omitted). The Minnesota Supreme Court has used the same reasoning. *Phipps v. Clark Oil & Refining Corp.*, 408 N.W.2d 569, 573 (Minn. 1987).

Similarly, the Supreme Court of Oregon refused to impose punitive damages in a case where it created a new cause of action, reasoning that "[i]f we held that punitive damages could be awarded in the present case we would be permitting the jury to punish defendants for conduct which they could not have determined beforehand was even actionable." *Nees v. Hocks*, 536 P.2d 512, 517 (Or. 1975). The Supreme Court of Illinois, following *Nees*, has held that "punitive damages should not be awarded where, as here, the cause of action forming the basis of the award is a novel one." *Kelsay v. Motorola, Inc.*, 384 N.E.2d 353, 360 (Ill. 1978). Similarly, the Nevada Supreme Court and at least one federal district court have refused to impose punitive damages retroactively. *Hansen v. Harrah's*, 675 P.2d 394 (1984); *Michael v. National Sec. Fire & Casualty Co.*, 458 F. Supp. 128 (N.D. Miss. 1978).

In contrast, in *Peterson v. Superior Court*, 642 P.2d 1305 (Cal. 1982), the Supreme Court of California expressly rejected state and federal constitutional challenges to the retrospective allowance of punitive damages. Similarly, the Alaska Supreme Court has announced a new rule of law, while at the same time imposing punitive

damages and declining on state law grounds to give the new rule prospective punitive effect only. *Alaskan Village, Inc. v. Smalley*, 720 P.2d 945 (Alaska 1986). The Idaho Supreme Court has also affirmed an award of punitive damages in a case where it created a new rule of law. *Sliman v. Aluminum Co.*, 731 P.2d 1267 (Idaho 1986), *cert. denied*, 486 U.S. 1031 (1988).

The constitutional issue posed here—the aggressive retroactive expansion of civil tort liability coupled with the imposition of punitive damage awards—has been a matter of increasing concern to federal courts. *See Eichenseer v. Reserve Life Ins. Co.*, 894 F.2d 1414, 1417 (5th Cir. 1990) (Jones, J., joined by Gee, Jolly and Smith, J.J., dissenting from denial of rehearing *en banc*), *cert. granted, judgment vacated and remanded*, 111 S. Ct. 1298 (1991), *appeal after remand*, 934 F.2d 1377 (5th Cir. 1991). There, as here, an activist state supreme court enlarged the scope of a tort and applied the new rules of conduct retroactively to both an award of compensatory damages and an award of punitive damages. Judge Jones persuasively argued that due process was violated by the imposition of punitive damages where the defendant failed to comply with a " 'clear requirement in Mississippi law' . . . two years before the 'clear requirement' was expressed by the Mississippi Supreme Court." 894 F.2d, at 1417.

The issue presented in this case has been before the Court on several occasions, but the Court has never reached it. The issue was before the Court in *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), but it was unnecessary for the Court to reach it and the Court chose not to do so. The Court noted, however, that it was an "important issue[] which, in an appropriate setting, *must be resolved.*" 475 U.S., at 828-29 (emphasis added). More recently, Justice O'Connor, joined by Justice Scalia, stated:

> [A]ppellant contends that the Mississippi Supreme Court changed its standards for judging when an

> insurer may be liable for punitive damages and applied the new standard retroactively to this case. Appellant explains that it had no advance notice of what conduct could render it liable for punitive damages . . . .
>
> Appellant has touched on a due process issue that I think is worthy of the Court's attention in an appropriate case.

Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 87 (1988) (O'Connor, J., joined by Scalia, J., concurring in part and concurring in the judgment).

II. POST-VERDICT REVIEW OF THE PUNITIVE DAMAGE AWARD

A. The Lack Of Any Post-Verdict Review Of The Reasonableness Of The Punitive Damage Award Violates Due Process

While this case was in the lower courts, this Court decided *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991), another Alabama case raising a due process challenge to a punitive damage award. There the Court recognized that, under certain circumstances, an award of punitive damages may "cross the line into the area of constitutional impropriety." 111 S. Ct., at 1046. In determining that the award in *Haslip* did not violate the Due Process Clause, the Court focused on three factors: the jury instructions, post-trial review of the award, and procedures for the Alabama Supreme Court to review the award.

The Court pointed out that in *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986), the Alabama Supreme Court established procedures for trial courts to review punitive damage awards. *Hammond* requires the trial court to "reflect in the record the reasons for interfering with a jury verdict, or refusing to do so, on grounds of excessiveness of the damages." 493 So. 2d, at 1379. The Alabama Supreme Court has set out seven

factors that are appropriate for the trial court to consider,[4] including, among others, " 'the culpability of the defendant's conduct,' the 'desirability of discouraging others from similar conduct,' 'the impact on the parties,' and 'other factors, such as the impact on innocent third parties.' " *Haslip*, 111 S. Ct., at 1044 (citation omitted). This led the Court to conclude that the "*Hammond* test ensures meaningful and adequate review by the trial court whenever a jury has fixed the punitive damages." *Id.*

In addition, the Court emphasized that the Alabama Supreme Court provides an additional check on the jury's discretion to award punitive damages. The Alabama Supreme Court first employs a comparative analysis and then applies the substantive standards it has developed for evaluating punitive awards. "In particular, it makes its review to ensure that the award does 'not exceed an amount that will accomplish society's goals of punishment and deterrence.' " 111 S. Ct., at 1045 (citations omitted). In the Court's view, this feature "distinguishes Alabama's system from the Vermont and Mississippi schemes about which Justices expressed concern in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989) and in *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988)." 111 S. Ct., at 1045 n.10. The Court concluded that "[t]his appellate review makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." 111 S. Ct., at 1045.

The punitive damage award in *Haslip* was upheld by this Court because the defendant had the benefit of *all* of Alabama's procedural protections. The jury instructions were adequate. 111 S. Ct., at 1046. The trial court held a post-trial hearing and made the findings required by

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[4] *Green Oil v. Hornsby*, 539 So. 2d 218, 223-24 (Ala. 1989), and *Central Alabama Electric Cooperative v. Tapley*, 546 So. 2d 371, 376-77 (Ala. 1989), augment the factors originally set out in *Hammond*.

Hammond. Id. Moreover, the Alabama Supreme Court reviewed the award and affirmed it. *Id.*

In this case, Petitioners plainly did not receive the post-trial review required by *Haslip.* After trial, Petitioners moved for Judgment Notwithstanding the Verdict, or in the Alternative, for a New Trial. The District Court denied that motion without any discussion of punitive damages (App. at 13a-16a). As the Court of Appeals concluded on identical facts in another case, "[c]learly this does not comply with *Hammond's* requirement to reflect in the record the reasons for refusing to interfere with the jury's verdict." *American Employers Ins. Co. v. Southern Seeding Serv., Inc.*, 931 F.2d 1453, 1458 (11th Cir. 1991).

Moreover, *Haslip* emphasized that appellate review of the punitive damage award was an important "additional check on the jury's or trial court's discretion." 111 S. Ct., at 1045. Appellate post-verdict review "ensures that punitive damage awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages." *Id.* Indeed, "post-verdict review by the Alabama Supreme Court has resulted in a reduction in punitive damages." *Id.* However, Petitioners received no appellate review of the reasonableness of the punitive damages awarded in this case. Despite being given two opportunities to do so, the Court of Appeals did not issue any opinion in this case.

There can be no doubt that Petitioners did not receive the due process protection of (1) a post-trial hearing and findings on the record, and (2) appellate review to ensure that the punitive damage award was "reasonable" and "rational." By failing to apply the *Hammond* factors and reflect their reasons for denial of the motions on the record, neither the District Court nor the Court of Appeals made any determination whether the punitive award was within the limits set by state law. Accordingly, if punitive damages are permitted at all in this case, the case must be remanded for consideration of the reasonableness of the award.

B. Federal Courts Are In Confusion Over How To Review Punitive Damage Awards

Like *Haslip*, this case is a due process challenge to an award of punitive damages by an Alabama jury. However, it differs from *Haslip* in that this is a federal, not a state, case. This Court has provided guidance as to the role of federal courts in reviewing a punitive damage award based on a state cause of action:

> In reviewing an award of punitive damages, the role of the District Court is to determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under Rule 59, whether a new trial or remittitur should be ordered. The Court of Appeals should then review the District Court's determination under an abuse of discretion standard.

Browning-Ferris, 492 U.S., at 279.

Several courts of appeals have held that determination of whether a punitive damage award is excessive in a diversity case is a matter governed by state substantive law. *See Cole v. Control Data Corp.*, 947 F.2d 313, 320 (8th Cir. 1991) (remanded for review of punitive damage award "applying the appropriate principles of Missouri law"); *Doe v. B.P.S. Guard Servs., Inc.*, 945 F.2d 1422, 1428 (8th Cir. 1991) (same); *Southern Seeding*, 931 F.2d, at 1457 (Alabama diversity case; remanded to district court for application of *Hammond* factors).

Another court of appeals has concluded that "in order to comport with the due process requirements of the Fifth Amendment, post-trial and appellate review of punitive damage awards in the federal courts . . . based upon state statutes and common law, can no longer be conducted under Virginia's 'excessiveness' standard but must instead proceed under standards similar to those enunciated by the Alabama courts in *Hammond*, *Green Oil*, and *Central Alabama*." *Johnson v. Hugo's Skateway*, 949 F.2d 1338, 1351 (4th Cir. 1991). The Eighth Circuit took yet another tack: it remanded an Arkansas

diversity case for the district court to review the reasonableness of a punitive damage award under *both* Arkansas law *and* the factors used by Alabama courts that this Court approved in *Haslip*. *Robertson Oil Co., Inc. v. Phillips Petroleum Co.*, 930 F.2d 1342, 1347 (8th Cir. 1991).

Finally, another panel of the Fourth Circuit, relying primarily on that court's *en banc* decision in *Defender Industries, Inc. v. Northwestern Mutual Life Insurance Co.*, 938 F.2d 502 (4th Cir. 1991), has held that "[t]he legitimizing constraints provided by the quasi *de novo* review process practiced under Alabama state law cannot be applied by a federal district court." *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 99 (4th Cir. 1991). According to *Mattison*, while a federal district court must apply the substantive law of the state when instructing the jury on punitive damages, it must review the jury verdict under the standards established by Rules 50(b) and 59 of the Federal Rules of Civil Procedure, as well as the Seventh Amendment. "Because the reviews under Rules 50(b) and 59 are more deferential to jury verdicts than appears to be the process under the state law of Alabama and because the Seventh Amendment does not permit a federal court to substitute its judgment for that of a jury . . . the guidance provided by the holding in *Haslip* is of limited assistance." *Id.*; *see also Hugo's Skateway*, 949 F.2d, at 1354 (Niemeyer, J., dissenting). Because a federal court "cannot substitute its judgment for that of the jury," its only remedy in the face of an excessive punitive damage award is to grant a new trial. *Mattison*, 947 F.2d, at 107-08. As *Mattison* recognizes, this leads to "the anomalous result that a decision on a claim for punitive damages could be significantly different depending on whether the case was tried in a federal court." *Id.* at 109.

The punitive damage award in this case received neither the post-verdict review of the trial court nor the appellate review mandated by *Haslip*. In the absence of intervention by this Court, the due process protection

mandated by *Haslip* will be illusory. The Court should, even if it upholds the retroactive imposition of punitive damages that Petitioners argue violates due process, grant certiorari to clarify the obligations of federal courts in reviewing punitive damage awards based on state law causes of action.

CONCLUSION

The issues presented by Petitioners are substantial and recurring. Punitive damages have been and will continue to be imposed by federal and state courts where no advance notice is given of the nature of the duty or the standard of conduct, despite federal constitutional guarantees. Moreover, the lower federal courts are confused over the standards that should govern the post-verdict review of punitive damage awards; at a minimum, this Court must make clear that the federal courts cannot shirk their duty to engage in meaningful post-verdict review of punitive damage awards. The petition should be granted and the case set for plenary consideration.

Respectfully submitted,

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July 6, 1992

APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-7838

D. C. Docket No. 88-0761-P

KITCHENS FOODS, INC.; MORGAN D. KITCHENS; BLAKELY M. KITCHENS; PAULINE H. KITCHENS; DOYLE KITCHENS,
Plaintiffs-Appellees,

versus

ARBY'S INC.; FRED BARTLIFF,
Defendants-Appellants,

KEN CLARK; FRANCHISE FINANCE CORP. OF AMERICA, INC., INSURED INCOME PROPERTIES, INC., A Delaware Limited Partnership, FFCA/IIP 1985 PROPERTY CO.,
Defendants.

Appeal from the United States District Court
for the Southern District of Alabama

(September 19, 1991)

Before ANDERSON, Circuit Judge, CLARK, Senior Circuit Judge and BROWN*, Senior District Judge.

PER CURIAM:

AFFIRMED. *See* Circuit Rule 36-1.

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* Honorable Wesley E. Brown, Senior U.S. District Judge for the District of Kansas, sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

C.A. 88-0761-P-C

KITCHENS FOODS, INC., *et al.*,
Plaintiffs

vs.

ARBY'S, INC. and FRED BARTLIFF,
Defendants

ORDER AND DIRECTIONS TO ENTER JUDGMENT ON SPECIAL INTERROGATORIES TO THE JURY

On Tuesday, June 19, 1990, came the parties by and through their counsel of record and announced ready for trial. The witnesses and the jury were sworn, the jury having been previously selected on Monday, June 18, 1990.

Plaintiffs completed their presentation of their case on Friday, June 22, 1990 and the defendants filed a motion for directed verdict. Oral arguments on the defendants' motion for directed verdict were entertained and the motion was DENIED. Court recessed.

Court reconvened on Monday, June 25, 1990 and continued through Tuesday, June 26, 1990. Defendants completed their presentation of their case and filed a second motion for directed verdict which was also DENIED.

On Wednesday, June 27, 1990, closing arguments were made and the Court gave its charge to the jury and the jury began its deliberation.

On Thursday, June 28, 1990, the jury returned to deliberate. At 12:10 p.m. a verdict was reached on special interrogatories, which are attached and incorporated as part of this order, and which found and assessed compensatory and punitive damages for the plaintiffs, Kitchens Foods, Inc., and Doyle Kitchens, Pauline Kitchens, Blakely Kitchens and Morgan Kitchens, individually and against the defendants, Arby's Inc., and Fred Bartliff as set out therein. It was agreed by all counsel that the court would enter judgment pursuant to the jury's answers to the interrogatories.

It is ORDERED that judgment be entered accordingly.

DONE at Mobile, Alabama, this the 3d day of July, 1990.

/s/ Virgil Pittman
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 88-0761-P

KITCHENS FOODS, INC., *et al.*,
Plaintiffs,

vs.

ARBY'S, INC., *et al.*,
Defendants.

INTERROGATORIES TO THE JURY

I. (A) Have the plaintiffs established by a preponderance of the evidence that Fred Bartliff made material misrepresentations to the plaintiffs which the plaintiffs justifiably relied upon and which induced them to act?

Answer:

(X) Yes ( ) No

If your answer is "YES," please go to (B).

If your answer is "NO," please go to II.

(B) Have the plaintiffs established by a preponderance of the evidence that any material misrepresentations made by Fred Bartliff were the proximate cause of injury to the plaintiffs?

Answer:

(X) Yes ( ) No

Please go to II.

II. (A) Have the plaintiffs established by a preponderance of the evidence that the defendants fraudulently suppressed information defendants had a duty to disclose?

Answer:

(X) Yes ( ) No

If your answer is "YES," please go to (B).

If your answers to I(A) *or* I(B) *and* II(A) are "NO," please go to the end and foreperson sign; otherwise go to B.

(B) Have the plaintiffs established by a preponderance of the evidence that such fraudulently suppressed information by the defendants was a proximate cause of injury to the plaintiffs?

Answer:

(X) Yes ( ) No

If your answer is "YES," please go to III.

If your answer is "No" to I(A) *or* I(B) *and* II(B), please go to the end and foreperson sign.

III. Have the plaintiffs established by a preponderance of the evidence that they were not aware of facts which would have led a reasonably prudent person to have discovered fraudulent misrepresentations on or before July 28, 1986?

Answer:

(X) Yes ( ) No

Please go to IV.

IV. Have the plaintiffs established by a preponderance of the evidence that they were not aware of facts which would have led a reasonably prudent person to have dis-

covered such fraudulently suppressed facts the defendants had a duty to disclose on or before July 28, 1986?

Answer:

(X) Yes ( ) No

If your answers to III *and* IV were "NO," please go to the end and foreperson sign.

If your answer to either III *and/or* IV was "YES," please go to V.

V. (A) If your answers to questions I(A) *and* I(B) *and/or* II(A) *and* II(B) were "YES," fill in the following:

We assess compensatory damages against the defendants as follows:

(1)	Kitchen Foods, Inc.	$300,000.
(2)	The plaintiffs individually, to wit:	
	Doyle Kitchens	$20,750
	Pauline Kitchens	$20,750
	Blake Kitchens	$20,750
	Morgan Kitchens	$20,750

(B) (1).

We assess punitive damages:

(X) Yes ( ) No

If your answer is "YES," please go to (B) (2).

If your answer is "NO," please go to the end and foreperson sign.

(B) (2).

We assess punitive damages against the defendants in favor of Kitchens Foods, Inc. in the amount of $1.5 million.

We assess punitive damages against the defendants in favor of the individual plaintiffs Doyle, Pauline, Blake, and Morgan Kitchens in the amount of $1.5 million.

/s/ Gayron J. Finlay
Foreperson

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 88-0761-P

KITCHENS FOODS, INC., *et al.*,
Plaintiffs,

vs.

ARBY'S, INC. and FRED BARTLIFF,
Defendants.

JUDGMENT

Pursuant to an agreement between the attorneys for the parties, this judgment is entered pursuant to the jury's interrogatories filed the 28th day of June, 1990.

Judgment is hereby entered for the plaintiffs against the defendants Arby's, Inc. and Fred Bartliff, as follows:

1. For the plaintiff Kitchens Foods, Inc., compensatory damages in the amount of $300,000.00 (three hundred thousand dollars) and punitive damages in the amount of $1,500,000.00 (one million five hundred thousand dollars); and,

2. For the plaintiff Doyle Kitchens, $20,750.00 (twenty thousand seven hundred and fifty dollars); for the plaintiff Pauline Kitchens, $20,750.00 (twenty thousand seven hundred and fifty dollars); for the plaintiff Morgan Kitchens, $20,750.00 (twenty thousand seven hundred and fifty dollars), and for the plaintiff Blakely Kitchens, $20,750.00 (twenty thousand seven hundred and fifty dollars), totaling $83,000.00 (eighty-three thousand dol-

lars), and against the defendants Arby's, Inc. and Fred Bartliff, and

3. Punitive damages for the plaintiffs Doyle Kitchens, Pauline Kitchens, Morgan Kitchens, and Blakely Kitchens totaling $1,500,000.00 (one million five hundred thousand dollars).

The total amount of punitive damages for Kitchens Foods, Inc. and Doyle Kitchens, Pauline Kitchens, Morgan Kitchens, and Blakely Kitchens is $1,500,000.00 (one million five hundred thousand dollars). The punitive damages are not cumulative as to the respective plaintiffs.

Costs are taxed against the defendants.

DONE the 3rd day of July, 1990.

/s/ Virgil Pittman
Senior United States District Judge

[Judgment Entered on Docket July 5, 1990]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-7838

KITCHENS FOODS, INC.; MORGAN D. KITCHENS; BLAKELY M. KITCHENS; PAULINE H. KITCHENS; DOYLE KITCHENS,
Plaintiffs-Appellees,

versus

ARBY'S INC.; FRED BARTLIFF,
Defendants-Appellants,

KEN CLARK; FRANCHISE FINANCE CORP. OF AMERICA, INC., INSURED INCOME PROPERTIES, INC., A Delaware Limited Partnership, FFCA/IIP 1985 PROPERTY CO.,
Defendants.

On Appeal from the United States District Court
for the Southern District of Alabama

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion September 19, 1991)

[Filed June 5, 1992]

Before: ANDERSON, Circuit Judge, CLARK, Senior Circuit Judge and BROWN*, Senior District Judge

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* Honorable Wesley E. Brown, Senior U.S. District Judge for the District of Kansas, sitting by designation.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ R. Lanier Anderson
United States Circuit Judge

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Miguel J. Cortez
Clerk

In Replying Give Number
Of Case And Names Of Parties

December 23, 1991

MEMORANDUM TO ALL COUNSEL AND PARTIES:

Re: 90-7838—KITCHENS FOOD, INC. -vs- ARBY'S INC.

The Court has directed appellees to file, within twenty-one (21) days from the date of this memorandum, a response to the suggestion for rehearing en banc. Appellee is also directed to file a letter brief addressing the issue of whether appellants properly preserved for appeal their challenge to punitive damages on the basis of the retroactivity grounds, also within twenty-one (21) days. The appellant will then have fourteen (14) days to respond to the appellee's letter brief.

Sincerely,

MIGUEL J. CORTEZ
Clerk

By: /s/ Joanne Kobin
Deputy Clerk

C: Wesley Pipes
Thomas W. Queen
Michael L. Sturm
Michael A. Youngpeter
T. Julian Motes
Richard Bounds
Andrew T. Citrin

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 88-0761-P

KITCHENS FOODS, INC., *et al.*,
Plaintiffs,

vs.

ARBY'S, INC., *et al.*,
Defendants.

ORDER DENYING DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

This case is before the court on defendants' motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. The case was tried before a jury on June 19-27, 1990. On June 28, 1990, the jury returned a verdict in favor of the plaintiffs; Kitchen Foods Inc., Doyle Kitchens, Pauline Kitchens, Blake Kitchens and Morgan Kitchens, assessing damages against the defendants, Arby's Inc. and Fred Bartliff, in the amounts of $383,000.00 compensatory damages and $1,500,000.00 punitive damages. Judgment was entered by the court on July 3, 1990, and the defendants filed the above mentioned motion and a response has been filed by the plaintiffs. After reviewing the motion and briefs in support and opposition thereof, the court concludes that the defendants' motion is due to be denied.

It is well established in this circuit that on a motion for judgment notwithstanding the verdict

> the Court should consider all of the evidence—not just that evidence which supports the non-mover's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting the motion is proper. On the other hand, if there is substantial evidence opposed to the motion[s], that is, evidence of such weight and quality that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motion[s] should be denied, ... A mere scintilla of evidence is insufficient to present a question for the jury. The motion[s] for . . . judgment n. o. v. should not be decided by which side has the better of the case, nor should [it] be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question. However, it is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses.

Boeing Co. v. Shipman, 411 F. 2d 365, 374-75 (5th Cir. 1969).[1] After considering all of the evidence, the court is of the opinion that the evidence produced during the trial is of such a nature that reasonable men might reach differing conclusions as to the verdict. Therefore, the defendants' motion for judgment notwithstanding the verdict is due to be denied.

On the defendants' motion for a new trial, the standard to be applied is whether the court

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[1] *See Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (*en banc*). The Eleventh Circuit, sitting *en banc*, adopted as binding precedent all decisions rendered by the former Fifth Circuit prior to October 1, 1981.

> believes the verdict rendered by the jury was contrary to the great weight of the evidence. "Although a trial judge cannot weigh the evidence when confronted with a motion [for judgment] notwithstanding the verdict, in a motion for a new trial the judge is free to weigh the evidence." *Rabun v. Kimberly-Clark Corp.*, 678 F.2d 1053, 1060 (11th Cir. 1982) (citing *King v. Exxon Co.*, 618 F.2d 1111, 1115 (5th Cir. 1980)). The trial court, however, must find the verdict contrary to the great, and not merely the greater, weight of the evidence. (citations omitted). Finally, when independently weighing the evidence, the trial court is to view not only that evidence favoring the jury verdict but evidence in favor of the moving party as well.

Williams v. City of Valdosta, 689 F. 2d 964, 973 (11th Cir. 1982). After reviewing and reweighing the evidence, the court is of the opinion that the jury's verdict is not against the great weight of the evidence. Additionally, the defendants asserted that the jury was improperly charged and that the jury verdict was excessive. After reviewing the charges which the defendants contended were improper, the court remains convinced that the charges were correct statements of the law applicable in Alabama. Furthermore, the jury's verdict is consistent with the evidence presented at trial as to the amount of damages awarded. Therefore, the defendants' motion for a new trial is due to be denied.

DONE this the 30th day of October, 1990.

/s/ Virgil Pittman
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 88-0761-P

KITCHENS FOODS, INC., *et al.*,
Plaintiffs,

vs.

ARBY'S, INC., *et al.*,
Defendants.

JUDGMENT

It is ORDERED, ADJUDGED and DECREED that the defendants' motion for judgment notwithstanding the verdict or, in the alternative, for a new trial is due to be and hereby is DENIED.

DONE this the 30th day of October, 1990.

/s/ Virgil Pittman
Senior United States District Judge

EXCERPTS FROM TRANSCRIPT OF TRIAL PROCEEDINGS

* * * *

[Testimony of Morgan Kitchens:]

[455] Q In particular, you received two separate offering circulars from Arby's; is that right?

A That's correct.

Q On April 4, 1985, Arby's sent to you a 1984 franchise offering circular; is that right?

A Yes, sir.

Q And the transmittal letter for that is Defendant's Exhibit 1, and the offering circular itself is Defendant's Exhibit 3?

A Are you asking me?

Q Would you like to look at them to confirm that's right?

A Yes, sir, I believe what you say, sir.

MR. BREEDLOVE: He accepted it.

BY MR. QUEEN:

Q I think we're ultimately going to need these. Wes, could you give him 1, 3, 6 and 7.

(Mr. Pipes complied.)

Q And then a little bit later when the 1985 offering circular became available, Arby's sent [456] that to you on May 15, 1985; right?

A That's correct.

Q And the cover letter transmitting the offering circular is Defendant's Exhibit 6, and the 1985 offering circular is Defendant's Exhibit 7; right?

A Yes, sir.

Q And you had both those offering circulars prior to Mr. Bartliff's visit to Gulf Shores; right?

A That is right.

Q I would like you to take a look, please, at the first offering circular that you received, which is Defendant's Exhibit 3. Do you have it there?

A Yes, sir.

Q The offering circular sets forth a great deal of information on a number of topics concerning what Arby's obligations are, what your obligations are and how this whole franchising process would proceed if you're interested; is that right?

A Yes, sir.

Q And among other things that are pertinent to some of the issues we've been discussing here so far, on page 8 of the offering circular there is a detailed statement of what kind of [457] costs you should expect to incur in land, building and equipment and other initial investment costs in an Arby's restaurant; right?

A That's correct.

Q And you were aware of these figures before Mr. Bartliff ever came to Gulf Shores?

A I don't recall any specific figures, but I did read the offering circular. I read through it.

Q And when you read the offering circular, that included page 8 with all this information about anticipated costs; right?

A I did read through it.

Q And you understood from that—since you lived in Gulf Shores, you understood that from that that the real estate costs, the real estate values in a resort community like Gulf Shores were off the scale in terms of normal land costs for a restaurant; right?

A Yes, sir.

Q Now, another thing that the offering circular mentioned was site selection procedures; is that right? Please look over on page 13. Do you have it there?

A Yes, sir, I do.

Q Toward the bottom of the page. And in that [458] paragraph right at the middle of the paragraph it says, doesn't it, "Franchiser does not undertake to

guarantee the suitability or success of the accepted site for the restaurant?

A Yes, sir.

Q And you read that and you understood that before Mr. Bartliff ever came to Gulf Shores?

A Yes, sir.

Q Now, turning on back to page 28 of the offering circular, there is a statement there with respect to projections of sales and earnings; right?

A Yes, sir.

Q Bottom of the page. And what it says to you is "Franchiser—that's Arby's; right?

A Yes, sir.

Q "Arby's does not give actual average projected or forecasted franchisee sales, profits or earnings to prospective franchisees;" right?

A Yes, that's what it says.

Q And you read that and understood that prior to the time that Mr. Bartliff ever came to Gulf Shores right?

A I never considered that statement to be in conflict with—

[459] Q Excuse me. You read it and understood it before he ever came; right?

A I did read it.

Q Well, you understood it?

A Yes, sir.

Q The franchise offering circular also gives you a computer printout that included the names, phone numbers and addresses of all of the other Arby's franchisees and restaurants in the state of Alabama at that time; right?

A Yes, sir.

Q It also provided you with information concerning the number of license agreements that were outstanding and that had been terminated in the three years prior; right?

A I believe that's in there.

* * * *

[464] Q Yes, sir. But it was a projection. It wasn't anything that was true or false. At the time it was a projection; right?

A Yes, sir.

Q And it was his opinion. Again, I'm not saying we agree with this, I just want to explore your story. It was a projection, it was an opinion, his opinion, Fred Bartliff's opinion about events in the future; right.

A It was a projection based on his knowledge of Arby's. Whether or not it was an opinion or not, I wouldn't—I wouldn't know if I could call it that. It was just a projection based on his knowledge.

Q As I say, it was an existing fact there wasn't any restaurant sitting there; right?

A No, sir, there wasn't.

Q So it wasn't a fact. It was his opinion about what might happen in the future?

A Yes, sir.

* * * *

[470] Q Now, let's focus back on the representation that you claim was made about your restaurant in Gulf Shores and the 10 to 18 percent net profit, that as we've gone through, was tied to the million dollar—so-called million dollar sales projection. Let's focus on that; okay?

A Okay.

Q Again, if it happened, it happened in May 1985 when it's a vacant lot; right?

A Yes, sir.

Q So, again, this net profit projection—excuse me, this net profit representation, if it was made, was a projection about some future event; right?

A Yes, sir.

Q And if it was made, it was, at most, Fred Bartliff's opinion about future events; right?

A Yes, sir.

* * * *

[Testimony of Doyle Kitchens:]

[844] Q So despite the fact that you acquired assets in excess of a million dollars, even you had had—I think it was a charter bus and car wash company, right, that had never made any money?

A I was a stockholder in it, yes, sir.

Q Well, now, let's pick up for a second here on the distinction that I think you were just alluding to and focus for a second on what either you or your sons say that Fred Bartliff said to you folks when he visited Gulf Shores.

And, again, as I have mentioned, I don't think I need to understand that we don't agree that these things weren't said. But I need to explore with you how this supposedly happened. And let's focus first on the claim about a million dollars in sales. Are you with me?

A Yes, sir.

Q Assuming that was said when Mr. Bartliff was there in Gulf Shores, obviously the restaurant wasn't opened; right?

A No.

Q I'm sorry, sir?

A No, sir.

Q What was to be the restaurant was a vacant lot that you folks looked at?

[845] A That's correct.

Q And so what level of sales there might or might not be on that vacant lot was—if it was said—was a projection about future events and what they might turn out to be; right?

A Right.

Q And what was said, if it was said, was Mr. Bartliff's opinion about how things might turn out in the future; right?

A That's correct.

Q Now, because nobody can see into the future, you understood that that was Mr. Bartliff's best assessment, his best guess about what happened; right?

A Yes, sir.

Q Now, let's shift our focus for a second from the claim about this alleged representation of a million dollars in sales and talk a little bit about the alleged representation concerning profits.

On your testimony, the only representation of profits, as I understand it, was that if there were a million dollars in sales at the restaurants, then there would be 10 to 18 percent profit; is that your claim?

A Yes, sir.

Q So with respect to that representation, if it were made, again, the restaurant wasn't opened; right?

[846] A No, sir.

Q So if the representation were made, what it was, at most, was Mr. Bartliff's projection about future profits; right?

A (No response.)

Q Yes or no, sir, please.

A I guess.

Q And what it was, if it was made, was Mr. Bartliff's opinion about future events; right?

A Right.

Q And as with the alleged sales representation, what it was, if it was made, was Mr. Bartliff's best assessment, his best guess, about what might happen in the future; right?

A Mr. Bartliff said that was a million dollar location if it was run right.

Q Well, sir, as we have just gone through, the restaurant wasn't built yet; right?

A That's correct.

Q So what it was was Mr. Bartliff's—if it was said—and that's the assumption I'm basing all these questions—if it was said, it was Mr. Bartliff's best assessment, his best guess, about what the future might hold at that location; right?

A That's correct.

* * * *

Supreme Court, U.S.
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No. 92-41

In The

Supreme Court of the United States

October Term, 1992

ARBY'S, INC. and FRED BARTLIFF,

Petitioners,

vs.

KITCHENS FOODS, INC., et al,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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STATEMENT OF THE CASE

A. Preservation of Constitutional Challenges

In their petition for writ of certiorari, Petitioners assert matter-of-factly:

> At all stages of the proceedings below, Petitioners asserted that the imposition of punitive damages has violated due process. Petitioners consistently maintained a due process objection to any award of punitive damages before both the District Court and the Court of Appeals. . . . Thus, both of the questions presented in this Petition are properly before the Court.

[Pet. for Cert. at pp. 4-5.] These statements are extremely misleading. Respondents do not contend that Petitioners failed to raise "a due process objection" in the courts below. However, as more fully explained *infra*, Petitioners have not timely pressed the particular due process issues asserted in their petition, and those issues were not passed upon by the courts below. Consequently, both of the questions presented in the petition for writ of certiorari are *not* properly before the Court.

B. Statement of the Facts

Petitioners misstate several facts and omit other material facts in their petition. Petitioners present the facts as if there were no claims submitted to the jury other than the claim based on projections of future sales and profits. Petitioners flatly state: "Respondents tried their fraud claim in the District Court *solely* on the basis of Bartliff's alleged projections concerning future sales and profits at a hypothetical restaurant. . . . " [Pet. for Cert. at p. 5.] This statement is patently false. In addition to the claim based on projections, Respondents asserted

(and proved) claims for misrepresentation of existing fact[1] and fraudulent suppression.

Furthermore, Petitioners misleadingly assert that "Respondents' fraudulent suppression claim cannot support the verdict because Respondents' admissions at trial plainly establish that any 'suppression' claim was time-barred." [Pet. for Cert. at p. 5 n. 2.] Remarkably, Petitioners fail to note that the jury specifically found Petitioners guilty of fraudulent suppression and *specifically found that this claim was not time-barred*. The interrogatories to the jury include the following specific findings:

> II.(A) Have the plaintiffs established by a preponderance of the evidence that the defendants fraudulently suppressed information defendants had a duty to disclose?
>
> ANSWER: (x) Yes (___) No
>
> * * *
>
> IV. Have the plaintiffs established by a preponderance of the evidence that they were not aware of facts which would have led a reasonably prudent person to have discovered such fraudulently suppressed facts the defendant had a duty to disclose on or before July 28, 1986?
>
> ANSWER: (x) Yes (___) No

[Pet. for Cert. at pp. 5a-6a.]

---

[1] Petitioners misrepresented to the Kitchens that the average annual sales of Arby's franchises were between $750,000.00 and $1,000,000.00, when the actual average annual sales were only between $500,000 and $600,000. (App. at 4a).

Petitioners misstate the facts for the purpose of "setting up" their retroactivity/due process argument. However, Petitioners' retroactivity/due process issue does not arise (and cannot be presented) under the correct facts because the jury's award of punitive damages is fully and independently supported by the jury's verdict on the fraudulent suppression claim, a cause of action which Petitioners cannot dispute existed under Alabama law in 1985.

Additionally, Petitioners fail to note that the jury found Petitioners guilty of *intentional* fraud and deceit.[2] Petitioners present their case as though they simply made "honest" guesses or projections to the Respondents. However, Respondents proved by clear and convincing evidence that Petitioners deliberately lied to Respondents (and to at least four other former Arby's franchisees who testified at trial) and intentionally and fraudulently induced Respondents to make substantial financial investments in an Arby's franchise by providing Respondents with blatantly false financial information.

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[2] Under Alabama law, punitive damages may be imposed for false representations in the form of an opinion only where the evidence establishes that the defendant stated the false opinions with an intent to deceive. *Reynolds v. Mitchell*, 529 So. 2d 227, 231 (Ala. 1988).

SUMMARY OF ARGUMENT

Petitioners propose to raise substantial constitutional challenges to the Eleventh Circuit's Rule 36-1 "no opinion" affirmance of the jury's verdict.[3] Petitioners premise their due process challenges upon assertions of fact which are completely at odds with the evidence of record in this case and well-established Alabama law. Moreover, Petitioners at no time effectively raised or pressed these issues in the courts below. Consequently, neither of the courts below considered these issues. Due to the absence of a properly developed record, there is nothing for this Court to review and Petitioners' petition for writ of certiorari is due to be denied.

Petitioners' retroactivity/due process argument is based on the legal and factual premises that representations in the form of opinions were not actionable under

---

[3] Under certain circumstances, the Eleventh Circuit Court of Appeals will affirm a judgment of a district court *without opinion*. Eleventh Circuit Rule 36-1, reads, in part, as follows:

> When the court determines that any of the following circumstances exist:
>
> * * *
>
> (b) the evidence in support of the verdict is sufficient;
>
> * * *
>
> (e) judgment has been entered without an error of law;
>
> *and an opinion would have no precedential value,* the judgment or order may be affirmed or enforced without opinion.

11th Cir. R. 36-1 (emphasis added).

any circumstances in Alabama in 1985, and that Petitioners were unaware in 1985 that the conduct alleged (and proved) by the Respondents could subject the Petitioners to liability for fraud and punitive damages. These premises are unsupported and incorrect.

Alabama courts have held for more than 100 years that a representation in the form of an opinion can support a claim for fraud in certain circumstances. Contrary to Petitioners' assertions, the 1988 *Reynolds* decision was not the first Alabama decision which permitted a fraud claim to be based on an opinion. The *Reynolds* decision simply applied a well-recognized exception to the general rule against allowing a fraud claim to be based on an opinion.

Additionally, it is clear that Petitioners had actual and constructive knowledge, in 1985 when they dealt with Respondents, that their conduct could subject them to liability for compensatory and punitive damages. The jury found Petitioners guilty of intentional, deceitful and fraudulent misconduct. Petitioners presented no evidence whatsoever that they were unaware of the consequences of this type of misconduct. Moreover, Petitioners' retroactivity/due process argument completely ignores the fact that the jury specifically found that Petitioners were guilty of fraudulent suppression. Fraudulent suppression was undeniably actionable under Alabama law in 1985.

Petitioners' second constitutional challenge is likewise without merit. Petitioners contend that they were denied due process by the lower courts' failure to review the "reasonableness" of the amount of the jury's punitive damages award. As with the first issue, Petitioners failed to raise this issue in the courts below. Most likely, the lower courts failed to review the "reasonableness" of the

punitive damages award because Petitioners never requested it. Consequently, Petitioners waived any argument regarding the reasonableness of the punitive damages award. Moreover, under Alabama law, Petitioners bore the burden of articulating reasons why the jury verdict is excessive, yet Petitioners presented no evidence whatsoever as to why the punitive award was excessive under the facts and circumstances of this case.

This Court's rules provide that "[a] petition for writ of certiorari will be granted only when there are special and important reasons therefor." Sup. Ct. R. 10. The instant petition fails to meet the criteria enumerated in Rule 10. The Eleventh Circuit's decision does not conflict with any decision of a federal court of appeals or any decision of this Court. Indeed, contrary to Petitioners' assertions, the lower courts' decisions are fully consistent with the well-established law in the State of Alabama, as well as other state and federal appellate decisions.

At best, Petitioners seek to have this Court render an "advisory opinion" regarding constitutional issues that do not arise within the context of this case. At worst, Petitioners seek to have this Court address a fact-bound dispute about whether the jury's verdict and punitive damages award is supported by the record. In any event, Petitioners failed to preserve either of their constitutional arguments for review, and Petitioners have failed to demonstrate that *this case* presents any issue which would warrant review by this Court.

REASONS FOR DENYING THE PETITION

I. RETROACTIVITY/DUE PROCESS ARGUMENT

A. Petitioners Failed to Preserve Their Retroactivity/Due Process Argument

Petitioners expressly concede that they raised their retroactivity challenge for the first time on appeal to the Eleventh Circuit. [Pet. for Cert. at p.5.] The trial court had no opportunity to consider or rule on this issue. Consequently, the Eleventh Circuit was under no obligation to consider this issue and, from aught that appears from its "no opinion" affirmance, the court did not consider it. As a result, the record has not been properly developed for this Court to consider this issue. For this reason alone, this Court need not consider Petitioners' retroactivity argument. *Kentucky v. Stincer*, 482 U.S. 730, 747 n. 22 (1987); *see also Patrick v. Burget*, 486 U.S. 94, 99 n. 5 (1988) ("This Court usually will decline to consider questions presented in a petition for certiorari that have not been considered by the lower court."); *Bankers Life and Casualty v. Crenshaw*, 486 U.S. 71, 79 (1988) ("[T]he policies that animate the 'not pressed or passed upon below' rule . . . [include] a constellation of practical considerations, chief among which is our own need for a properly developed record on appeal.").

Petitioners contend that the "earliest opportunity" they had to raise their retroactivity/due process argument was before the Eleventh Circuit Court of Appeals. [Pet. for Cert. at pp. 4-5.] However, Petitioners' assertion that they could not have raised their retroactivity/due process argument in the trial court is based on an irrational interpretation of Alabama case law. Petitioners' retroactivity argument is based on Petitioners' suggestion

that a case decided by the Alabama Supreme Court in 1988 [*Reynolds v. Mitchell*, 529 So.2d 227 (Ala. 1988)] created a new cause of action in Alabama. Petitioners allege that in *Reynolds* the court "first suggested that a fraud claim could be based on an opinion." [Pet. for Cert. at p.8.] According to Petitioners, under no circumstances prior to the *Reynolds* decision, could a litigant in Alabama have based a fraud claim on a statement of opinion. Building on this erroneous premise, Petitioners contend that this "new cause of action" was applied retroactively at trial in 1990 to impose punitive damages against them for their 1985 conduct. [Pet. for Cert. at p. 7-8.][4]

However, even if the 1988 *Reynolds* decision had created a new cause of action as Petitioners suggest, then Petitioners' retroactivity/due process argument should have been raised during the July 1990 trial of this matter. Petitioners were fully aware of the *Reynolds* decision before the trial of this case[5], but Petitioners never raised this issue to the trial court. Petitioners now contend that they raised this issue at the "earliest opportunity" before the Eleventh Circuit.

---

[4] As discussed in more detail *infra*, Petitioners simply misstate Alabama law and the holding in *Reynolds*. The *Reynolds* case did not change the law in Alabama. The Alabama Supreme Court in *Reynolds* did not state or indicate in any way that the court was changing the law or creating a new cause of action, as Petitioners suggest. The law in Alabama has always been, and it is now, that while generally an action for fraud may not be based on a statement of an opinion, there are circumstances under which a representation in the form of an opinion is actionable under Alabama law.

[5] Respondents cited and relied upon the *Reynolds* decision in opposing the summary judgment motion filed by Petitioners in early 1989.

To excuse their failure to raise this issue in the trial court, Petitioners argue that the Alabama Supreme Court, after supposedly changing the law in the 1988 *Reynolds* case, promptly reversed *Reynolds* in the December, 1989 case of *Keller v. Security Federal Savings & Loan Ass'n*, 555 So. 2d 151 (Ala. 1989). Petitioners argue that *Keller* "reinstated" the rule that under no circumstances could a fraud claim be predicated on a representation in the form of an opinion. According to the Petitioners, the *Keller* case was the controlling precedent at the time of the July 1990 trial of this case, and thus there was no retroactivity argument to be made by Petitioners at the time of trial. According to Petitioners, the retroactivity argument became ripe only after the Alabama Supreme Court supposedly overruled *Keller* in the September 1990 cases of *Rodopoulos v. Sam Piki Enterprises, Inc.*, 570 So.2d 661 (Ala. 1990) and *Fraser v. Reynolds*, 588 So.2d 442 (Ala. 1990), wherein, Petitioners contend, the Alabama Supreme Court reinstated the "new law" supposedly created in *Reynolds*.

However, Petitioners' interpretation of the Alabama Supreme Court's intentions in the above-referenced cases is nonsensical. The supreme court in *Keller* made no mention of overruling *Reynolds* or any other decision. The court in *Keller* simply stated the general rule that fraud may not be predicated on an opinion. *Keller*, 555 So.2d at 155.[6] Likewise, the supreme court in *Fraser* and

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[6] Petitioners contend that the Alabama Supreme Court's failure in *Keller* to recite any and all applicable exceptions to the general rule amounted to an implicit overruling of any and all such exceptions. Petitioners' argument is disingenuous at best. If Petitioners' reasoning were correct, any time a court states a bare principle of law without reciting the attendant litany of

Rodopoulos simply stated the exception to the general rule, and the court in no way stated an intent to overrule *Keller* or the general rule against allowing fraud to be based on an opinion. *See Rodopoulos*, 570 So.2d at 663-64. *See also Fraser*, 588 So.2d at 445-46 (The trial court's jury instruction "told the jury . . . everything it needed to know in this case as to when a statement of opinion can constitute actionable fraud.") Nevertheless, Petitioners' argue that the Alabama Supreme Court continues to "silently" reverse itself back-and-forth on this issue, and that every time the Alabama Supreme Court recites the general rule without mentioning the exceptions to the rule, the general rule is overruled, and vice versa.[7]

Petitioners' unreasonable interpretation of the Alabama Supreme Court's intentions in the above-referenced

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hundreds of years of qualifications, exceptions and refinements, the same would be implicitly overruled. Such reasoning is without support or merit.

[7] Interestingly, Petitioners argued throughout the course of this case (prior to the appeal to the Eleventh Circuit) that the *Reynolds* decision did *not* represent a change in Alabama law. In May, 1989 (six months *before* the *Keller* decision), Petitioners specifically argued that the Alabama Supreme Court had not created a "new cause of action" in *Reynolds*, stating instead:

> "*Reynolds* does not purport to override the longstanding rule that claims for fraud normally must be predicated on representations pertaining to *existing* material facts; indeed, the Court specifically reiterates this general rule."

[Petitioners' reply brief in support of Petitioners' Motion for Summary Judgment, p. 7] It was not until Petitioners concocted their retroactivity/due process argument on appeal to the Eleventh Circuit that the Petitioners argued that the *Reynolds* decision had changed the law in Alabama.

cases is designed to (but does not) explain why Petitioners did not raise the retroactivity/due process issue before the trial court. The Eleventh Circuit likely rejected Petitioners' claim that the retroactivity/due process argument was timely raised,[8] as should this Court. Accordingly, the Court should decline review on that basis alone.

B. Petitioners Have Not Suffered a Retroactive Imposition of Punitive Damages

Even if Petitioners had preserved their retroactivity/due process argument, there is no basis in fact or law to entitle Petitioners to present such an argument in this case. Petitioners' retroactivity argument rests on the following premises:

(1) fraudulent representations in the form of an opinion were not actionable under any circumstances in Alabama in 1985 at the time the fraudulent statements were made,

(2) the jury verdict against Petitioners was based *solely* on the Plaintiff's claim for misrepresentation of opinion, and

(3) Petitioners were unaware in 1985 that their conduct could subject them to liability for fraud and punitive damages.

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[8] The Eleventh Circuit specifically requested that the parties submit briefs addressing whether Petitioners timely raised their retroactivity/due process argument. The Eleventh Circuit's "no-opinion" affirmance and summary denial of Petitioners' suggestion for rehearing in banc demonstrates that the court either determined that the Petitioners had not timely raised the retroactivity argument or that the argument was without merit, or both.

As shown below, each of these premises is unsupported and incorrect.

1. Intentionally false opinions have been actionable in Alabama for over a century.

Respondents have never disputed (and do not now) the general rule in Alabama that an action for fraud may not be based on a statement of an opinion. However, the Alabama Supreme Court has recognized exceptions to this general rule for as long as the general rule has existed. In the 1884 case of *Montgomery Southern Railway Co. v. Matthews*, 77 Ala. 357 (1884), the Alabama Supreme Court addressed the issue of whether the following representation could support a claim for fraud:

> That the said railroad, for stock in which the said note was given, *would run near* [defendant's] land, within one to two miles thereof, substantially along the 18th range line, and *would be built* within two years from the date of said note. . . .

Id. at 359 (emphasis added). The railroad asserted that the representation was mere opinion and therefore could not support a claim of fraud. *Id.* at 359-60, 366. Rejecting the railroad's argument, the Alabama Supreme Court held:

> An opinion expressed, even if not realized, cannot, without more, become a fraudulent representation. [Citation omitted.] If, however, such opinion is falsely expressed, with intent to deceive, and does deceive, this constitutes such opinion or representation a false statement of fact, and vitiates a contract thereby procured unless the representation relates to a matter equally open to both parties.
>
> * * *

> If . . . the representation be made as a matter of opinion only, then, to obtain any relief, the purchaser must show that the representation was made knowing its falsehood. Less than an intentional deception, in such conditions, gives no right of action.

Id. at 364-65, 366. Cases decided subsequent to *Matthews* confirm that this longstanding exception to the general rule has existed in Alabama since before the turn of the century. *See, e.g., Griel v. Lomax*, 89 Ala. 420, 426, 6 So. 741 (1889) ("If the alleged representation is construed as an opinion, to be fraudulent, it must be shown to be knowingly false, made with intent to deceive, and to have been accepted and relied on by the plaintiffs as true."); *Bradfield v. Elyton Land Co.*, 93 Ala. 527, 529, 8 So. 383 (1890) ("An opinion 'to be the basis of a legal right in any case, must be knowingly false, and uttered with intent to deceive.' ").

In the 1938 case of *Shepherd v. Kendrick*, 236 Ala. 289, 181 So. 782 (1938), the Alabama Supreme Court explained the rationale for allowing an opinion to serve as the basis for a fraud claim:

> 'It is material to observe that it is often fallaciously assumed that a statement of opinion cannot involve the statement of a fact. * * * If the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of material fact, for he impliedly states that he knows facts which justify his opinion.'

Shepherd, 236 Ala. at 293 (quoting *Kefuss v. Whitley*, 220 Mich. 67, 189 N.W. 76 [which in turn quoted from the English common law decision of Lord Bowen in *Smith v. Land & House Property Corp.*, L.R., 28 Ch. Div. 15]). The rationale espoused in *Shepherd* reconciles the idea of

allowing recovery in fraud based on an opinion with the longstanding requirement that a fraud claim be based on a statement of fact. Statements of opinion which fall within the ambit of the exception stated in *Shepherd*, in effect, become statements of fact and therefore do not violate the requirement that fraud must be based on a statement of existing fact. *See Randell v. Banzhoff*, 375 So. 2d 445, 448 (Ala. 1979) ("In the instant case, any 'opinions' of appellant in this regard were reasonably treated by appellee as existing facts."); *Tillis v. Smith Sons Lumber Co.*, 188 Ala. 122, 134, 65 So. 1015 (1914) ("Under such circumstances the affirmation of a definite opinion as to value becomes an affirmation of fact, that is, of *the fact of a bona fide opinion*; and if it is falsely and fraudulently made 'to mislead or cheat another, to abuse his confidence, or to blind his judgment, it is in law and morals as reprehensible as if any other fact were affirmed for the like purpose.' ") (emphasis added).

The court in *Shepherd* held that the defendant's representation about the permanency of the water supply on the land the defendant sold to plaintiff, though opinion, could amount to actionable fraud since the facts regarding the water supply were not equally known to both sides, and the opinion involved the implied statement that the defendant knew facts which justified his opinion. *Id. See also Ringer v. First National Bank*, 291 Ala. 364, 369, 281 So. 2d 261 (1973) (A bank's opinion as to the financial stability and dependability of third persons could serve as the basis of a fraud claim.); *Scholz Homes, Inc. v. Hooper*, 287 Ala. 628, 632-33, 254 So. 2d 328 (1971) (Opinion as to the projected cost of a house to be built in the future could serve as the basis of a fraud claim.); *Stephens v. Hill*, 249 Ala. 299, 301, 31 So. 2d 136 (1947) ("Here the facts

were not equally well known to both sides. Appellee did not know the land, but the vendors knew it, and the statement as to the amount of timber on the land and the amount of cultivatable land on the farm involved a statement of fact, for the vendors impliedly stated they knew facts which justified their opinion.").

The Alabama Supreme Court's decision in *Reynolds v. Mitchell*, 529 So. 2d 227 (Ala. 1988), is consistent with this well-established line of authority. Citing its 1938 decision in *Shepherd*, the court stated:

> The representations that the apartments would be financially successful could be considered simply statements of opinion. Normally, the courts will not allow a statement of opinion to be a basis on which to predicate a claim of fraud. *However, if there is proof of actual fraudulent intent at the time the representation is made and the person succeeds in the deception and injury results, an action for fraud may be predicated on such a representation, notwithstanding the opinion nature of the representation.*
>
> * * *
>
> In certain situations a person may reasonably rely on the representation of an opinion. For instance, where the facts are not equally known to both sides, a statement of opinion by the one who knows the facts better, often involves a statement of material fact that justifies his opinion. . . .

Id. at 231 (emphasis added).

The trial court's instructions to the jury essentially mirror the language employed by the Alabama Supreme Court in *Shepherd* and *Reynolds* to articulate the circumstances in which a fraud claim can be predicated on an

opinion.[9] Thus, contrary to Petitioners' contentions, the trial court did not retroactively apply a new rule of law in this case.

2. The jury verdict was not based solely on claims for misrepresentation of opinion.

At trial, Respondents asserted two additional fraud theories, independent of their claim based on misrepresentation of an opinion. First, the jury specifically returned a verdict against Petitioners on a fraudulent *suppression* claim. [Pet. for Cert. App. at 5a.] The fraudulent suppression claim, standing alone, supports the jury's verdict against the Petitioners. Petitioners' retroactivity/due process argument disregards the jury's finding of liability on the fraudulent suppression claim. Petitioners have not argued (and cannot successfully argue) that fraudulent suppression is a new or expanded tort created by the Alabama Supreme Court since 1985.

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[9] The trial court's charge to the jury included the following instruction:

> In certain situations a person may justifiably rely on the representation of an opinion. For instance, where the facts are not equally known to both sides, a statement of opinion by the one who knows the facts better, often involves a statement of material fact that justifies his opinion. Therefore, in such a situation, an action for fraud may be based on an opinion, depending on whether the reliance on the representation of the opinion is justifiable.
>
> If it's been established by a preponderance of the evidence that the defendants made representations of opinions with the intent to deceive . . . and the deception was successful and the plaintiffs suffered injuries as a proximate result, then the defendants in such event would be guilty of legal fraud. (App. at 10a-11a.)

Second, Respondents' pursued (and proved) a claim against Petitioners for misrepresentation of an *existing* fact. One of the Respondents, Doyle Kitchens, testified during trial (and during his deposition) that Petitioner Bartliff represented to him that the average annual sales of Arby's restaurants ranged between $750,000.00 and $1,000,000.00. (App. at 4a.) The undisputed testimony at trial established that the average annual sales of Arby's restaurants during the relevant time periods was between $500,000.00 and $600,000.00. (App. at 4a.) Petitioners cannot deny that a misrepresentation concerning the *actual* annual sales of Arby's restaurants was actionable in Alabama in 1985. For this reason, too, Petitioners' retroactivity/due process argument is without merit.

3. Petitioners knew in 1985 that their actions were unlawful and could subject them to liability.

Petitioners argue that they were unaware in 1985 that the conduct alleged (and proved) by Respondents could subject them to liability for fraud and punitive damages. Specifically, Petitioners contend that they were not aware that they were engaging in wrongful conduct (1) when they projected that the Respondents' restaurant would generate over $1 million in annual sales, even though the average annual sales for Arby's restaurants in the southeast region was only about $500,000.00 (App. at 1a-2a, 4a-6a); (2) when they projected annual net profit percentages of 10 to 18% even though Bartliff acknowledged at trial that he had no basis for making such projections (App. at 1a, 8a); (3) when they misrepresented the average annual sales generated by Arby's restaurants (App. at 4a); (4) when they told the Respondents about specific

successful Arby's restaurants while failing to disclose the numerous failures of Arby's restaurants owned by individual operators like the Respondents (App. at 1a-3a); and (5) when they failed to disclose that an operator such as the Respondents had less than a 1% chance of generating one million dollars in annual sales. (App. at 6a-8a.)

Petitioners present the facts as though they were simply making "honest" guesses or projections to the Respondents. However, as the jury found, Petitioners were guilty of *intentional* deceit and fraud. The evidence at trial overwhelmingly established that Petitioners deliberately lied to the Respondents (and other Arby's franchisees) and provided the Respondents with blatantly false financial information and projections.[10]

Given the intentional, deceitful nature of their conduct, Petitioners' assertion that they had no notice that their conduct could subject them to liability for fraud and punitive damages is not credible. In any event, there is not one iota of evidence – documentary, testimonial, or otherwise – to support Petitioners' contention that they were ignorant of the wrongfulness of their conduct. Indeed, their own testimony at trial belies such an assertion.[11]

---

[10] Pursuant to the trial court's charge, the jury found that Respondents satisfied a heightened standard of proof – *clear and convincing evidence* – with respect to the punitive damages claim. (App. at 10a.)

[11] Petitioners acknowledged at trial that they were aware in 1985 that FTC regulations prohibited franchisors from giving oral projections of earnings and sales to prospective franchisees. (App. at 8a-10a.)

Moreover, Petitioners do not contend they were unaware in 1985 that they could be held liable for compensatory and punitive damages for fraudulent suppression and misrepresentation of existing fact.[12] Accordingly, Petitioners have no basis in fact or law for complaining that they had no "notice" in 1985 that their conduct was actionable. Petitioners' due process argument is wholly without foundation or merit.

To summarize, in order to reach Petitioners' retroactivity/due process argument, this Court would have to find:

(1) that the *Reynolds* decision created "new law" or a "new cause of action",

(2) that the so-called "new cause of action" was the sole basis of Petitioners' liability for punitive damages,

(3) that Petitioners were unaware prior to *Reynolds* that their conduct could subject them to liability for fraud and punitive damages, and

(4) that Petitioners timely raised this issue in the courts below.

---

[12] Petitioners cannot (and do not) dispute that "fraudulent suppression" and "misrepresentation of existing fact" were well-recognized causes of action in Alabama in 1985. Furthermore, although Petitioners dispute that they had constructive knowledge in 1985 that representations in the form of an opinion could serve as the predicate of fraud claim in Alabama, Petitioners could have referred to the American Jurisprudence legal encyclopedia which states: "It is usually held . . . and it is the position taken by the courts in the recent decisions, that the expression of an opinion not in reality entertained may constitute actionable fraud where it is stated falsely and with intent to deceive . . . . " 37 Am. Jur. 2d, *Fraud and Deceit* § 53 (1968) (citing the Alabama case of *Montgomery S.R. Co. v. Matthews*, 77 Ala. 357 (1884)).

However, not one of the above statements is correct. Consequently, there is no factual or legal predicate upon which Petitioners may assert their retroactivity/due process argument.[13]

II. POST-VERDICT REVIEW OF PUNITIVE DAMAGES AWARD

A. Petitioners Failed to Request a Post-Verdict Review of the "Reasonableness" of the Punitive Damages Award

In their petition for writ of certiorari, Petitioners assert *for the first time at any stage of these proceedings* the argument that the punitive damages award was excessive and that the lower courts inadequately reviewed the reasonableness of the punitive damages award. Petitioners never raised this issue in the trial court.[14] Indeed, Petitioners did not even file a motion for remittitur.

The *only* due process argument ever asserted by Petitioners in the District Court appeared in their motion for

---

[13] Additionally, even if Petitioners' retroactivity/due process argument could have been made in this case, there has been no *ex post facto* violation with respect to Petitioners' situation. Petitioners cannot show they were "disadvantaged" by the so-called "new law" in *Reynolds*, since the punitive damages the jury could have awarded as a result of Petitioners' misrepresentation of opinion were no more onerous than the punitive damages the jury could have awarded with respect to the fraudulent suppression claim. *See Miller v. Florida*, 482 U.S. 423, 429 (1987).

[14] The only excessiveness issue raised by Petitioners related to the compensatory award. Petitioners vigorously asserted that the jury unjustifiably awarded $20,750 to Pauline Kitchens, arguing that Mrs. Kitchens' failure to testify precluded as a matter of law the jury's finding of Mrs. Kitchens' reliance and damage.

judgment notwithstanding the verdict and new trial, and read as follows:

> The award of punitive damages in this case is unconstitutional in that it is a violation of due process guaranteed under the Fifth and Fourteenth Amendments to the Constitution of the United States and under Article I and VI of the Constitution of Alabama of 1901, upon the following grounds separately and severally:
>
> a. The trial procedures and jury instructions fail to provide specific standards for the imposition of an award of punitive damages;
>
> b. The trial procedures and jury instructions fail to provide specific standards for the amount of any award of punitive damages;
>
> c. The trial procedures and jury instructions fail to provide a limit on the amount of the award;
>
> d. The trial procedures and jury instructions permitted the award of punitive damages solely upon the grounds of respondent [sic] superior;
>
> e. The trial procedures and jury instructions fail to provide a clear standard for appellate review of the award of punitive damages;
>
> f. The trial procedures and jury instructions allowed imposition of punishment on a reduced standard of proof.

Regardless of how Petitioners would now like to characterize the above-quoted language, these allegations constitute nothing more than the boilerplate "inadequate guidelines" arguments addressed by this Court in *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S.Ct. 1032 (1991). At the

time Petitioners filed their post-trial motion, the *Haslip* case had not yet been decided, and it is clear that Petitioners simply were attempting to preserve their "*Haslip*" arguments in the event this Court found merit to such arguments.

After the District Court denied Petitioners' post-trial motion, this Court decided the *Haslip* case. Consequently, in their appeal to the Eleventh Circuit, Petitioners did not raise any *Haslip* arguments. Instead, this Court having rejected the *Haslip* arguments (at least with respect to Alabama law), Petitioners asserted for the first time their retroactivity/due process argument. Petitioners did not in any manner argue to the Eleventh Circuit that the punitive damages award was unconstitutionally excessive, or that the trial court erred by failing to review *sua sponte* the reasonableness of the punitive damages award.

Petitioners now contend that their due process challenge to the post-verdict review of the punitive award is a "mere enlargement" of their retroactivity/due process argument. Such a contention stretches the truth and logic beyond any reasonable bounds. Petitioners retroactivity/due process argument in no way alerted the Eleventh Circuit that Petitioners were seeking review of the amount of the punitive award, or that Petitioners were seeking review of the trial court's failure to review the reasonableness of the award.[15]

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[15] Even if the *Haslip* arguments could have been deemed sufficient to raise the issue of excessiveness of the punitive award to the trial court, Petitioners cannot seriously or truthfully contend that they raised the issue of excessiveness of the punitive award (or the trial court's review of the punitive award) to the Eleventh Circuit.

In *Banker's Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 77 (1988), this Court held that "a vague appeal to constitutional principles" does not preserve specific constitutional claims. In *Crenshaw*, the Court determined that an appellant who complained in the court below that the punitive damages award "was clearly excessive . . . and violates constitutional principles[,]" failed to preserve for appeal a due process claim based on the alleged excessiveness of the punitive damages award. *Id.* (quoting *Taylor v. Illinois*, 484 U.S. 400, 407 n. 9 (1988) ("A generic reference to the Fourteenth Amendment is not sufficient to preserve a constitutional claim based on an unidentified provision of the Bill of Rights . . . ").

Likewise, Petitioners' excessiveness argument is by no means a "mere enlargement" of the very specific retroactivity/due process argument asserted by Petitioners in their appeal to the Eleventh Circuit. The Court in *Crenshaw* stated:

> Similarly, appellant's challenges in this Court to the size of the punitive damages award in no way qualify as 'mere enlargements' of claims made before the Mississippi Supreme Court. Under the mere enlargement doctrine, '[p]arties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed.' *Dewey v. Des Moines*, 173 U.S. 193, 198, 43 L.Ed. 665, 19 S.Ct. 379 (1899) [citation omitted]. Dewey makes clear, however, that the federal question must be brought to the attention of the court below in some manner. 'A claim or [illegible] which has never been made or asserted cannot be said to have been denied by a judgment which does not refer to it.'

Crenshaw, 486 U.S. at 78 n. 2. There is no connection between Petitioners' retroactivity/due process argument and their excessiveness/due process argument, and Petitioners have no basis for relying on the "mere enlargement" doctrine to preserve their excessiveness/due process argument. *See, e.g., Illinois v. Gates*, 462 U.S. 213, 220 n. 2 (1983).[16]

Petitioners have long since waived any arguments regarding the alleged excessiveness of or inadequate review of the punitive damages award. Accordingly, certiorari is due to be denied on this issue.[17]

B. Petitioners Presented no Evidence that the Punitive Damages Award was Excessive

Under Alabama law, a defendant bears the burden of proving that a jury's verdict is excessive. *McDowell v. Key*, 557 So. 2d 1243, 1249 (Ala. 1990). It is not sufficient for a

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[16] In support of their "mere enlargement" contention, Petitioners cite Justice White's concurrence in *Illinois v. Gates*, in which Justice White criticized the majority's strict adherence to the "not pressed or passed upon below" rule. However, Justice White stated in that same concurrence that to properly preserve an issue for appeal, the issue must be brought to the attention of the lower court "with fair precision." *Illinois*, 462 U.S. at 247. Petitioners cannot credibly argue that their excessiveness/due process argument was brought to the attention of the Eleventh Circuit with fair precision *or any precision*.

[17] Petitioners do not contend that this is an "exceptional case" and that the Court should consider overlooking Petitioners' failure to preserve their constitutional issues. Apparently, not even the resourceful Petitioners could devise a reason why this Court should deviate from its normal practice of refusing to consider issues which have not been properly raised below. Consequently, Petitioners must steadfastly assert that they preserved their constitutional arguments.

defendant to simply file a motion for new trial and/or remittitur and claim that the amount of the jury's verdict is, *ipso facto*, excessive. Instead, the defendant must *prove* that the verdict is excessive. To do this, the defendant must submit *evidence* as to certain factors[18] it wishes the trial court to consider in evaluating the size of the jury's verdict. *Id.* In the absence of such evidence, the trial court will not be in a position to evaluate the size of the jury's verdict.

In the instant case, Petitioners failed to present any evidence at any time that the punitive damages award was excessive. Petitioners never requested the trial court to hold a hearing regarding the reasonableness of the punitive damages award. Petitioners never complained to the Eleventh Circuit that the punitive damages award was excessive or that the trial court failed to review the reasonableness of the punitive damages award. Now, for the first time, Petitioners seek review of the reasonableness of the punitive damages award, and ask this Court to remand the case for that purpose.

However, the consequence under Alabama law of Petitioners' failure to submit any evidence of the alleged excessiveness of the punitive damages award is dramatically illustrated by the recent decision in *Fuller v. Preferred*

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[18] The factors which a trial court may consider in determining whether the jury award of punitive damages is excessive include: (1) the relationship between the punitive award and the harm from defendant's conduct; (2) the degree of reprehensibility of the defendant's conduct; (3) the pecuniary gain by the defendant through the wrongful conduct; (4) the financial position of the defendant; (5) the costs of litigation; and (6) criminal sanctions and/or other civil awards levied against the defendant for the same conduct. *Green Oil Co. v. Hornsby*, 539 So.2d 218, 223 (Ala. 1989).

Risk Life Ins. Co., 577 So. 2d 878 (Ala. 1991). In *Fuller*, the court, reinstating a $1,000,000 fraud verdict, held:

> In this case, the trial judge failed to make the finding required by *Hammond v. City of Gadsden*, supra, and *Green Oil Co. v. Hornsby*, supra. Does this require a remand as argued by Preferred Risk? We hold that it does not in the posture of this case. When the jury returned its verdict, Preferred Risk filed its motion for new trial, a judgment notwithstanding the verdict, or a remittitur. Preferred Risk argued only that, because the verdict exceeded the amount claimed in the complaint, it was due to be reduced. It did not offer any evidence in support of its contention that the verdict was excessive, and instead argued that it was entitled to a reduction of the verdict as a matter of law.
>
> * * *
>
> This Court observed in *Industrial Chemical & Fiberglass Corp. v. Chandler*, 547 So. 2d 812 (Ala. 1988), as follows:
>
> > 'Nothing prevents the defendant, at a hearing on a motion for new trial based on an allegedly flawed verdict, from presenting evidence to prove one or more of the above considerations [Hammond factors], and, by doing so, to guarantee that his rights to due process of law in regard to the jury's award is protected. In sum, "fundamental fairness" requires that defendant be given the opportunity to present proof to the trial court during post-judgment review of the verdict that the award is unreasonable, disproportionate, or economically destructive . . . '
>
> 547 So. 2d at 838. Preferred Risk had this opportunity and elected to present no evidence at all.

* * *

> The record is devoid of any evidence that will justify interference with the verdict under the criteria established in *Hammond, Green Oil Co.* and their progeny.

Id. at 885-86.

The Alabama Supreme Court followed its *Fuller* holding in *Associates Financial Services Co. of Alabama, Inc. v. Barbour*, 592 So. 2d 191 (Ala. 1991):

> Like the defendant in *Fuller*, supra, Associates was given the opportunity to present evidence concerning the factors identified by this court in *Hammond* and *Green Oil Co.*, yet Associates consciously elected not to do so. The trial court was presented no evidence concerning Associates' financial position, the availability of liability insurance, the existence of other civil litigation, criminal sanctions, or profit derived from real estate transactions. In the absence of such evidence, as noted by the trial court, 'the court is in no position to evaluate or consider these factors.' *McDowell v. Key*, 557 So. 2d 1243, 1246 (Ala. 1990).
>
> * * *
>
> Under these circumstances, the trial court correctly refused to remit the jury's verdicts.

Id. at 198-99. In short, Petitioners bore the burden of presenting evidence that the jury's verdict was excessive. Petitioners failed to present any such evidence to the trial court, despite ample opportunity to do so. Further, Petitioners made no complaint to the Eleventh Circuit that they did not have an opportunity to present evidence of the alleged excessiveness of the punitive award. Indeed, Petitioners' failure to present any evidence of alleged excessiveness underscores that the punitive award was

not excessive.[19] In any event, by failing to present evidence (or to attempt to present evidence) regarding the alleged excessiveness of the punitive award, Petitioners waived any arguments regarding the alleged excessiveness of the punitive award and the post-verdict review of that award.

C. The Lack of a Post-Verdict Review of the "Reasonableness" of the Punitive Damages Award Does Not Warrant Review By This Court

Even if Petitioners had preserved the excessiveness/due process issue for review, it does not warrant review by this Court. Petitioners attempt to create an issue worthy of certiorari by suggesting that lower federal courts are confused about how or whether to apply state-law procedures for post-verdict review of punitive damages awards. [Pet. for Cert. at p.17.] However, this is not a case where the trial or appellate court exhibited any confusion about what standards to apply because no review of the reasonableness of the punitive damages award was requested or conducted. In the absence of such review, this Court would be issuing an advisory opinion to address an alleged confusion regarding federal court review of punitive damages awards.

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[19] A simple comparison of the punitive award ($1,500,000) and the compensatory award ($383,000) demonstrates that the punitive award was not out-of-line, particularly in light of the jury's finding that Petitioners *intentionally* defrauded the Respondents (as well as numerous other former Arby's franchisees).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Excerpts from Transcript of Trial Proceedings

[Testimony of Morgan Kitchens]

[282] Q. During the time of your meeting with him and riding around with him, did y'all discuss the issues of, you know, 'how much money can we make on this thing?'

A. Yes, I did. And he said that I could expect a net profit of 10 to 18 percent of sales. And I also asked him various figures relating to food costs and paper costs and he was very informative about that.

* * *

[284] Q. And what did he tell you the estimated sales would be for the site that y'all discussed, based on his knowledge with Arby's and his expertise?

A. At least a million dollars.

* * *

[286] Q. Did he tell you that the sales figure of a million dollars one time, or was it something that was mentioned more than one time?

A. He repeatedly said that figure to us.

Q. Did you all question him as far as, "Well, how come you think we'll make a million dollars at this location?"

A. He really liked the area because he said that Burger King was located next to it, there was a Delchamps Shopping Center, and said that we would be the first fast-food that you'd approach into town, and basically he felt very [287] comfortable with that figure, because Burger King was

doing such a strong business at the time and just his knowledge of what the Arby's stores make in his area.

Q. Did he indicate that he had knowledge of what Arby's stores made?

A. Yes, he did. And I had asked him and he had mentioned that – talked about the Deuprees in Sylacauga. He said that their store was about seven hundred and fifty thousand to eight hundred thousand dollars.

Q. Now, is that the same Chuck Deupree who just came here and testified that they really made about three hundred thousand dollars a year, in one year, or maybe four hundred?

A. Yes, sir.

Q. He told you back then they were making how much?

A. Seven hundred and fifty thousand or more; to eight hundred thousand.

* * *

[300] Q. What number did you put in there [Site Acceptance Request], based on your conversation with Arby's that the projected annual sales for that site would be?

A. They said –

Q. What did you write down there?

A. A million dollars plus.

Q. It says a million plus?

[301] A. Yes, sir.

Q. Any where did you get that figure?

A. From Arby's.

Q. And is this a document, please, sir, that was sent to FFCA, or was this sent on May 31st, back up to Atlanta to Arby's?

A. Sent back to Atlanta to Arby's.

Q. Did anybody from Arby's at that time call you and say, "Hey, wait a minute, man, you've got a projection of a million dollars on this little store in Gulf Shores. What are you thinking of?" That there's no way that you would make a million dollars or even close to it at that store?

A. No, sir, they did not.

* * *

[Testimony of Doyle Kitchens]

[867] Q. But did you rely on Mr. Bartliff's knowledge and expertise in dealing with Arby's in order to make those projections for you?

A. Totally.

Q. And did he tell you – this is the issue in this case – Did he tell you, looking you in the eye, that an Arby's at that location that you showed him would make, in his opinion, based on what he knew about the company sales, in excess of a million dollars?

A. Yes, sir. More than one time.

Q. Did you rely on it?

A. Yes, sir, I did.

Q. Did he tell you that an average Arby's made 10 to 18 percent net profit?

A. Yes, he did.

Q. Did you rely on it?

A. Yes, I did.

Q. Did he tell you that an average store in Arby's made $750,000 to a million dollars a year in sales?

A. Yes, he did.

* * *

[868] Q. Have you learned later that the average Arby's store really makes, as they told us in their sworn interrogatory answers in this case, average sales of about five hundred to six hundred thousand dollars?

A. Yes, sir. I learned that in some of the depositions or later.

[Testimony of Douglas Southard]

[363] A. As part of our work, we were asked to analyze some data provided by Arby's with respect to the sales revenues of their licensees in Alabama, Florida, Georgia, and Mississippi. That data was provided from 1984 through 1987.

* * *

[368] Q. What was the average [annual sales] of a small franchisee in 1984?

A. Four hundred thirty-six thousand dollars.

* * *

Q. I'm going to put a K right there for Kitchens, because that would be the group they'd be in; right?

A. That's the group they're in, yes.

* * *

[370] Q. All right. And if you exclude those stores that make less than two hundred thousand dollars a year in gross sales, what does that do to the average sales over here?

A. For any particular group?

Q. For 1984. I'm sorry. When you exclude those making less than two hundred thousand dollars.

A. Okay. The average for all goes up to about five hundred sixty thousand dollars.

Q. Okay. And what was the average for the Kitchens group, the small franchisee?

A. It goes to four hundred eighty-nine thousand dollars.

* * *

[371] Q. What was the average of all stores based on the data that they gave you, the data that you reviewed in 1985?

A. Five hundred six thousand dollars.

Q. Right here?

A. Yes.

Q. That's the blue one. Okay.

What was average for all small franchisees like the Kitchens in 1985?

A. Four hundred twenty-one thousand.

Q. Now, can you tell me – I think it's in your report somewhere – do you know what the Kitchens' average – not average but what their actual sales were in 1986?

[372] A. Okay.

Q. Their first year of operation, first full year.

A. 1986 calendar year from Arby's or their 1986 fiscal year? Which one? I think I've got both.

Q. All right. Fiscal year.

A. Their fiscal year ended – that actually ends June 1987, which was their first full year, they did four hundred sixty thousand dollars.

Q. Four hundred sixty thousand dollars?

A. That's correct.

* * *

[373] Q. What was average for all small franchisees like the Kitchens in 1986?

A. Four hundred sixty-seven.

* * *

[380] Q. What about in 1985? If you exclude the two hundred thousand dollars and less, what percentage or what probability was it that you'd make a million dollars in sales in 1985, based on this information?

A. It was .57 percent.

Q. A half a percent?

A. Right.

Q. Is that one out of two hundred?

A. Roughly, yeah.

Q. What about in 1986?

A. It's .35 percent.

Q. Which is even worse; right?

A. About one out of three hundred.

Q. And in 1987, we peaked up a little bit to about 1985; is that right?

A. To about a half a percent.

Q. Okay. Again, one out of two hundred?

[381] (Witness nods affirmatively.)

Q. Oh, I meant to ask you this, another thing. Look at, if you will, page – I think it's page 9. I guess it is, isn't it?

A. Yes.

Q. Page 9. And you've broken down the same type calculations into small franchisees, people that have less than seven stores?

A. Right.

Q. Six or less. What was the chance or the probability in 1984 that somebody in the small group like the Kitchens had, based on this information that we got from Arby's, now, of making a million dollars in gross sales?

A. It was about .13 percent.

Q. And what is .13 percent? If .5 percent's one out of two hundred, what's .13 percent?

A. It's about one out of eight hundred.

Q. One out of eight hundred. Okay.

In 1985, what was the chance of somebody with a small franchisee of making a million dollars in gross sales, based on this information by Arby's.

A. About one out of a thousand.

Q. That's .10 percent; right?

A. Right.

[Testimony of Fred Bartliff]

[703] Q. Go to page 93, line 12.

"Did you ever tell the Kitchenses that all or most of Arby's franchise restaurants generate a net profit of between 10 and 18 percent [704] annually?"

A. "No. I did not tell them that. I would have no reason to tell them that."

Q. "Because you don't know whether that's true or untrue?"

A. "I don't have access to the franchisee's P & L's, and I would not have any way to know whether that was true or not."

* * *

[732] Q. All right. You spoke about a Federal Trade Commission regulation. What does it say?

A. Federal Trade Commission is the governing body as to your offering circular that you hand out to prospective franchisees.

They have a section in your offering circular item 19, I believe. That is an earnings claim statement and basically what they're saying is that what you put in your earnings claims statement, if you chose to provide numbers, then you are able to provide the numbers that are in the earnings claim statement. And if you do provide those numbers, then you do need to have [733] backup information to support those numbers. If you chose not to

provide numbers, then you may not tell people numbers.

[Testimony of Karen Shellady]

[788] Q. And you mentioned the FTC. Would you tell the jury what the FTC is?

A. The FTC is the Federal Trade Commission who governs or issues rulings on franchising.

Q. And the FTC is a group by the United States government that issues rules and regulations about what you can tell franchisees and what you can't tell them; right?

A. Yes.

Q. And you told us there were two methods that the FTC says that you can do, if you want to; right?

A. Right.

* * *

[789] Q. So there are two methods. One is tell them and, [790] two, you don't, about profits and sales forecasts and sales figures; right?

A. Yes.

* * *

Q. And if Arby's in Atlanta, Georgia wanted to tell the people what the true average store volume was for the years '84, '85, '86 and '87, if they wanted to tell them, they could do that if they did it in writing under the FTC rules, could they not?

A. Yes.

Q. But Arby's chose not to tell them; right?

A. Well, our franchisees can.

Q. Sure. Well, let's talk about Arby's. Arby's chose in your offering circular –

A. Not to disclose.

Q. – not to tell them that information; right?

A. Yes.

* * *

[791] Q. Okay. . . . the regional franchise managers are told that they can't tell that information about profits and projected sales; right?

A. Yes.

[Trial Court's Charge to the Jury]

[1148] For the plaintiff to be entitled to recover punitive damages, the plaintiff must prove by clear and convincing evidence that a defendant consciously had an intent to deceive.

* * *

[1160] In certain situations a person may justifiably rely on the representation of an opinion. For instance, where the facts are not equally known to both sides, a statement of opinion by the one who knows that facts better, often involves a statement of material fact that justifies his opinion. Therefore, in such a situation, an action for fraud may be based on an opinion, depending on whether the reliance on the representation of the opinion is justifiable.

If it's been established by a preponderance of the evidence that the defendants made representations of opinions with the intent to deceive – now you

have to consider this together with all the instructions, just don't take out one – there also must be an intent to deceive or defraud the [1161] plaintiffs and the deception was successful and the plaintiffs suffered injuries as a proximate result, then the defendants in such event would be guilty of legal fraud.

Supreme Court, U.S.
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No. 92-41

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ARBY'S, INC. and FRED BARTLIFF,
Petitioners,

v.

KITCHENS FOODS, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITIONERS' REPLY BRIEF

INTRODUCTION AND SUMMARY

The Petition establishes that, whether accomplished by legislative act or judicial fiat, the retroactive imposition of punitive damages for conduct that was not actionable at the time it occurred violates the Due Process Clause and its inherent concepts of notice and fundamental fairness. Respondents do not refute or even question this fundamental principle of due process. Instead, they assert that liability here was not premised on a post-conduct change in Alabama fraud law. However, an examination of the "century of Alabama case law" cited by Respondents confirms that, as demonstrated in the Petition, statements of opinion were not actionable as fraud under Alabama law in 1985. Similarly, the record does not support Respondents' various attempts to establish an alternative basis for the $1.5 million punitive damage award. Thus, this case squarely presents an issue that has divided lower courts: whether the retroactive imposition of punitive damages violates due process.

Respondents' contention that this due process issue was not preserved also is contradicted by the record. Petitioners directly raised a due process challenge to the imposition of punitive damages before the District Court. Similarly, once the factual and legal predicate for the retroactivity argument—*i.e.*, the change in Alabama fraud law—occurred, Petitioners briefed and argued this precise issue before the Court of Appeals.

Respondents also do not dispute the basic principle that due process mandates post-verdict review of the reasonableness of punitive damage awards. Instead, in an attempt to condition this due process right on procedural requirements that have not been recognized by this Court, Respondents apparently assert that Petitioners were under an obligation to file a separate post-trial motion directed exclusively to the excessiveness of the punitive damage award and to present additional evidence on the issue. Respondents' attempts to impose previously unrecognized

procedural requirements contravene the explicit mandates of this Court's decision in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991), and ignore the status of the law at the time this case was before the District Court and the Court of Appeals. Thus, at a minimum, the Court should remand this action to the District Court for reconsideration in light of the post-verdict review procedures mandated by *Haslip*.

ARGUMENT

A. Retroactivity

1. *Statements Of Opinion Were Not Actionable In Alabama In 1985.*

In an attempt to rebut the factual premise underlying Petitioners' due process challenge, Respondents cite a litany of Alabama Supreme Court decisions dating back to the late 1800's purporting to establish that false statements of opinion were actionable in 1985. Opposition, at 12-15. However, Respondents' case law does not include a single decision involving an actionable opinion as to future events (in contrast to a promise of future action—*i.e.*, promissory fraud). In fact, in many of the cases cited by Respondents in support of their purported "long-standing exception," recovery was denied. *See Bradfield v. Elyton Land Co.*, 8 So. 383 (Ala. 1890); *Griel v. Lomax*, 6 So. 741 (Ala. 1889); *Montgomery Southern Railway Co. v. Matthews*, 77 Ala. 357 (1884). Indeed, in the case principally relied upon by Respondents, *Montgomery Southern*, the Court held that the alleged representations of opinion regarding the construction of a railroad line were not actionable. 77 Ala., at 366.

A number of the other decisions cited by Respondents involve promissory fraud. *See Randell v. Banzhoff*, 375 So. 2d 445 (Ala. 1979) (representation by franchisor that it would locate purchaser for franchise), *cert. denied*, 444 U.S. 1081 (1980); *Scholz Homes, Inc. v. Hooper*, 254 So. 2d 328 (Ala. 1971) (representation by contractor that cost of construction of home would not exceed specified amount). Promissory fraud is a separate cause of

action "based upon a promise to perform or abstain from performing some act in the future." *P&S Bus., Inc. v. South Cent. Bell Tel. Co.*, 466 So. 2d 928, 930 (Ala. 1985). Until the Alabama Supreme Court's 1990 decision in *Reynolds*, promissory fraud had long been recognized as the sole exception to the rule that a fraud claim must be based on a statement of existing fact. *See, e.g., P&S Bus.*, 466 So. 2d, at 930. However, Respondents here did not plead—and certainly did not prove—a claim for promissory fraud.

The remainder of the Alabama Supreme Court decisions cited by Respondents involve representations of existing fact. For instance, in *Shepherd v. Kendrick*, 181 So. 782, 784 (Ala. 1938), the representation at issue related to an existing fact: the permanence of streams represented to have been "never dry." [1] Moreover, Respondents' characterization of *Shepherd* has been repudiated by the Alabama Supreme Court itself, which has cited *Shepherd* in support of the traditional existing fact requirement:

> We have ruled consistently that an actionable misrepresentation must be of present fact. *See, e.g., Scholz Homes, Inc. v. Hooper*, 287 Ala. 628, 254 So. 2d 328 (1971), *Birmingham Broadcasting Co. v. Bell*, 259 Ala. 656, 68 So. 2d 314 (1953); *Shepherd v. Kendrick*, 236 Ala. 289, 181 So. 782 (1938) . . . . Plaintiffs cannot recover . . . because they failed to prove misrepresentation of an existing material fact.

Sly v. First Nat'l Bank, 387 So. 2d 198, 200 (Ala. 1980).

An examination of the cases cited in the Opposition reveals that the "longstanding exception" asserted by

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[1] *See also Ringer v. First Nat'l Bank*, 281 So. 2d 261 (Ala. 1973) (representation by bank that payments had been made under assumption agreement and that purchasers were more qualified than other proposed purchasers); *Stephens v. Hill*, 31 So. 2d 136 (Ala. 1947) (representation of value and quantity of lumber on land); *Tillis v. Smith Sons Lumber Co.*, 65 So. 1015 (Ala. 1914) (representation that bonds and preferred stock "were as good as gold" and "were secured by a first mortgage on all the property" of the railroad company).

Respondents has no support in the law. Rather, as shown in the Petition,[2] opinions as to future events were not actionable in Alabama in 1985. *See, e.g., Jones v. McGuffin*, 454 So. 2d 509, 512 (Ala. 1984) ("It is axiomatic that mere statements of opinion are not material facts upon which actions for legal fraud can be maintained").

2. *The Retroactivity Argument Was Preserved Below.*

Respondents also argue that Petitioners did not preserve their retroactivity challenge to the imposition of punitive damages. *See* Opposition, at 7-10. However, Petitioners could not assert a retroactivity challenge based on a change in the law before that change in the law occurred. At the time of trial, the Alabama Supreme Court's most recent holding was that "[f]raud cannot be based on opinion." *Keller v. Security Fed. Sav. & Loan Ass'n*, 555 So. 2d 151, 155 (Ala. 1989). This holding, which was not *dictum* or the mere rote statement of a general rule, as Respondents suggest, was entirely consistent with longstanding Alabama precedent. *See, e.g., Jones*, 454 So. 2d, at 512. Thus, when the present case was before the District Court, it appeared that (1) Petitioners were entitled to judgment on Respondents' fraud claims because those claims were based on statements that, at best, were opinions; and (2) there was no proper basis for arguing that Alabama law with respect to the fact/opinion distinction had changed since the conduct at issue occurred, because the law both at the time of the conduct (1985) and at the time of trial (1990) was that fraud could not be based on opinion.

Respondents argue that a retroactivity challenge should have been raised before the District Court in light of the Alabama Supreme Court's decision in *Reynolds v. Mitchell*, 529 So. 2d 227 (Ala. 1988). *See* Opposition, at 8-9. However, at the time of the trial and the post-trial motions, *Reynolds* could not reasonably have been understood as a change in Alabama fraud law. The *Reynolds*

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[2] Petition, at 7-8.

Court did not give any indication that it intended to overrule the longstanding rule concerning opinion representations. Moreover, the cases cited in the pertinent passage of *Reynolds* appeared to confirm that the Court was not changing its rule. *See* 529 So. 2d, at 231. The first of these cases dealt with a misrepresentation of existing fact; the other three cases cited all were promissory fraud cases in which recovery ultimately was denied.

Thus, at the time, *Reynolds* appeared to be either an aberration decided on its particular facts or a case analyzed by the Court as promissory fraud. This view of *Reynolds* was confirmed a year later, when the Alabama Supreme Court expressly and without qualification held that "[f]raud cannot be based on opinion." *Keller v. Security Fed. Sav. & Loan Ass'n*, 555 So. 2d 151, 155 (Ala. 1989). *Keller* was not the only post-*Reynolds* case that confirmed this rule. *See Cornelius v. Austin*, 542 So. 2d 1220, 1223 (Ala. 1989) ("the defendants' statements constitute an expression of opinion, not a misrepresentation of fact").

The Alabama Supreme Court's decisions thus demonstrate that the change of law that is the predicate of Petitioners' retroactivity argument did not become apparent until later, particularly with the subsequent decision in *Reynolds*. *See Fraser v. Reynolds*, 588 So. 2d 442 (Ala. 1990), *subsequent appeal*, 588 So. 2d 448 (Ala. 1991); *see also Rodopoulos v. Sam Piki Enters., Inc.*, 570 So. 2d 661 (Ala. 1990). Accordingly, the retroactivity argument is properly before the Court for consideration because Petitioners raised the argument before the Court of Appeals—the first opportunity after the basis for the argument arose.

3. *The Award Of Punitive Damages Is Supported Exclusively By The Alleged Representations Of Opinion.*

Respondents also assert that there was some "independent basis" for the award of punitive damages. Opposition, at 16-17. However, the record demonstrates that the

award can be supported, if at all, only by the alleged representations of opinion.

In a bald attempt to recreate the record below, Respondents argue that they "pursued (and proved)" a claim for a misrepresentation of existing fact concerning average sales at Arby's restaurants. Opposition, at 17. This contention is patently false. The alleged misrepresentation of existing fact now proffered by Respondents to support the verdict was never at issue at trial. It (1) was not identified in the Complaint, which specifically delineated the claimed misrepresentations; (2) was not included in the Pre-Trial Statement; (3) was not raised in Respondents' Pre-Trial Brief; (4) was not described by any witness during Respondents' case-in-chief; and (5) was never argued to the jury as a basis for a finding of fraud. Indeed, the first time that this alleged representation was cited as a basis to support the verdict was in Respondents' Brief in Opposition to the Motion for Judgment Notwithstanding the Verdict. Respondents cannot now rely on this alleged misrepresentation, which was not at issue, to support a punitive damage award that is otherwise improper on the issues tried.

Respondents also argue that the fraudulent suppression claim provides an independent basis for the award of punitive damages. Opposition, at 16. Although they did not set out the grounds for their respective decisions, neither court below could have affirmed the verdict on this basis. At trial, the only information that Respondents claimed was "suppressed" was average sales at Arby's restaurants. Respondents admitted that they received an Offering Circular from Arby's in May 1985 that advised Respondents in writing that average sales figures would not be provided. (App. at 17a-19a). Petitioners are aware of no cases—and Respondents have cited none—that suggest that fraudulent suppression may be found where there was an explicit contemporaneous statement that the "suppressed" information would not be provided. In any event, Respondents' suppression claim, filed in July 1988, necessarily was time-barred under the two

year statute of limitations because Respondents were aware of the "suppression" in May 1985, when they were told the information would not be provided.

Accordingly, neither the supposed claim based on a representation of existing fact nor the "suppression" claim can provide an independent basis for the award of punitive damages.

B. Post-Verdict Review

Respondents suggest that Petitioners somehow waived any due process objection to the adequacy of post-verdict review of the award. Opposition, at 20-24. Respondents' argument ignores the fact that Petitioners consistently and specifically asserted a due process challenge to the imposition of punitive damages before both the District Court and the Court of Appeals. Petitioners explicitly challenged on due process grounds the excessiveness of the punitive damage award and the trial procedures used to assess punitive damages in their Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial.[3] Likewise, before the Court of Appeals, Petitioners maintained their due process challenge to the award of punitive damages.[4] Thus, the issue of whether the award of punitive damages comports with due process consistently has been at issue in the courts below. In any event, for the reasons set forth in the Petition, post-

[3] Petitioners argued in their Brief in support of this Motion that "[t]he excessiveness of this award, as well as the fact that under the law there was no limit on the jury's discretion to make such an award, demonstrates that the system under which the award was made does not comply with due process."

[4] Petitioners raised a due process challenge to the retroactive imposition of punitive damages before the Court of Appeals and in their Petition before this Court. The additional issue raised in the Petition—post-verdict review—is but a "mere enlargement" of these due process challenges. *See Illinois v. Gates*, 462 U.S. 213, 248 (1983) (White, J., concurring). Unlike the cases cited by Respondents, Petitioners' due process objections were not "vague appeal[s] to constitutional principles," *Banker's Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 77 (1988), or mere "generic reference[s]" to the Due Process Clause, *Taylor v. Illinois*, 484 U.S. 400, 407 n.9 (1988).

verdict review pursuant to the procedural scheme mandated by *Haslip* is not conditioned on any specific request or demand by a defendant. *See* Petition, at 13-14.

In support of their waiver argument, Respondents note that Petitioners did not file a separate motion for a remittitur seeking a reduction of the punitive damage award. Opposition, at 20. Respondents' objection highlights the split in the Circuits regarding the procedures available to federal district courts in conducting post-verdict review. In the Fourth Circuit's view, the only remedy available to a federal district court in the face of an excessive punitive damage award is a new trial. *See Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 99 (4th Cir. 1991). *But see Cole v. Control Data Corp.*, 947 F.2d 313, 320 (8th Cir. 1991) (remanding for application of "appropriate principles of Missouri law"). Thus, under the Fourth Circuit rule, the Motion for a New Trial that was filed by Petitioners was the only procedural mechanism available to challenge the excessiveness of the punitive damage award.

At a minimum, it is clear that Petitioners are entitled to a remand to the District Court. At the time of the trial and the post-trial motions, *Haslip* had not yet been decided and there was no existing "federal right" to post-verdict review of punitive damage awards. Based in part on this Court granting certiorari, vacating the judgments, and remanding twelve cases in connection with its decision in *Haslip*,[5] the Eighth Circuit has recognized that cases pending in the federal courts at the time *Haslip* was

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[5] *See, e.g., Clayton Brokerage Co. v. Jordan*, 111 S. Ct. 1298 (1991); *Reserve Life Ins. Co. v. Eichenseer*, 111 S. Ct. 1298 (1991); *Hospital Auth. v. Jones*, 111 S. Ct. 1298 (1991). *These remands were afforded regardless of whether a precise Haslip-type due process challenge was raised in the Petition. See, e.g., Portec, Inc. v. Post Office*, No. 90-827, Petition for Writ of Certiorari (filed Nov. 26, 1990) (seeking review of "[w]hether the Colorado punitive damages statute which was applicable to this case is unconstitutional in violation of the due process clause of the United States Constitution"); *Clayton Brokerage Co. v. Jordan*, No. 88-1483, Petition for Writ of Certiorari (filed Mar. 8, 1989).

decided are entitled to a remand for reconsideration in light of the new due process standards. *See Robertson Oil Co. v. Phillips Petroleum Co.*, 930 F.2d 1342 (8th Cir. 1991) (case pending when *Haslip* was decided; court remanded for reconsideration under *Haslip*); *Cole v. Control Data Corp.*, 947 F.2d 313 (8th Cir. 1991) (same); *Doe v. B.P.S. Guard Servs., Inc.*, 945 F.2d 1422 (8th Cir. 1991) (same). Therefore, consistent with the procedures adopted by this Court and the Eighth Circuit, this case should be remanded to the District Court for reconsideration under the due process standards enunciated in *Haslip*.

Respondents also argue that Petitioners were obligated to present additional evidence supporting the excessiveness of the punitive damage award at a post-trial hearing. Opposition, at 24-27. The Alabama decisions cited by Respondents on this point are inapposite. *See* Opposition, at 26-27. In each of these cases, the court afforded the defendant the post-verdict review required by the Alabama Supreme Court in *Hammond v. City of Gladsen*, 493 So. 2d 1374 (Ala. 1986), but the defendant chose not to present evidence during the course of that review. *See, e.g., Associates Fin. Servs. Co. v. Barbour*, 592 So. 2d 191, 198 (Ala. 1991) (defendant "consciously elected" not to present evidence concerning the factors identified in *Hammond* during the post-verdict review hearing). These cases do not address the situation where, as here, the defendant was not afforded post-verdict review in the first instance.[6]

Thus, Respondents have failed to establish any procedural bar to Petitioners' right to post-verdict review of the punitive damage award. The Court should grant

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[6] In any event, as discussed above, *Haslip* had not yet been decided at the time this case was before the District Court and there was no recognized "federal right" to post-verdict review of punitive damages awards. Therefore, Petitioners were not obligated to present evidence supporting the excessiveness of the punitive damage award.

certiorari to resolve the substantive issues raised in the Petition and to clarify the dramatic split in the Circuits regarding the substantive standards and procedures applicable to post-verdict review by federal courts. However, even if the Court declines to undertake plenary review of the issues raised in the Petition, this case should be remanded to the District Court for a hearing in accordance with the procedures set forth in *Haslip*.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court grant their Petition for a Writ of Certiorari.

Respectfully submitted,

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